65.

J. L. Brannan
writes the regards of
Amara McEaton

Providence, May 28. 1912

My Dear Mr. Brannan

I send you with this a copy of Parts 1 & 2 on "Bills, Notes & Checks" that I prepared for the Inst. School of Correspondence of Chicago, a year and a half ago. Not now because you are probably getting ready for your examinations but later, when you have time, please read it. Bear in mind for the fact that it is written for beginners and tell me what you think of it. If it is worth it, I would like to have it reviewed in the Harv. Law Rev. next fall. I have not a high opinion of School of Correspondence but this one is certainly well managed. They made me a temptuous offer that I could not refuse! It is only now they have printed it, all this time I send me proofs.

Yours truly

Andrew M. Eaton

BILLS, NOTES, AND CHECKS

PART I

INSTRUCTION PAPER

PREPARED BY

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CHICAGO ILLINOIS

U.S.A.

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LAW OF BILLS, NOTES, AND CHECKS

PART I

INTRODUCTION

In writing for beginners this elementary treatise on the law of bills, notes, checks and certificates of deposit, I have tried to keep certain aims in mind. Besides seeking to impart the rudiments of knowledge of this difficult but interesting subject, I have tried to inculcate upon my students the necessity of careful study of the cases, and of thinking out for themselves solutions of the problems discussed. Only by so doing can they become able to express opinions that are more than mere parrot-like imitations of what they have been told.

In my opinion, to become a lawyer, the student must cultivate the habit of arriving at his own independent judgment upon the correctness of every decision he studies. Right decisions will at all times bear the light of day, while it is always in order to show incorrect reasoning—however great the reputation of the judges—provided it is done in the right spirit and without calling names.

I am a firm believer in the historical method of studying the origin of law through a chronological study of the cases and the statutes. To this end I have added the date of every decision. Many lawyers argue their cases with citations of decisions on their briefs without any attention to their order; with the result, sometimes, of finding that the decisions on which they rely were overruled by later decisions or by a statute that has superseded them. You

may open, practically, any law book or digest of recent date; and you will find a mass of cases on almost any proposition of law thrown at you, all in a heap and without reference to their chronological order.

I am also of opinion that the common method of writing textbooks is wrong. It is not enough to state a doctrine and to support it by an array of decisions, even if decisions to the contrary are also cited. The correctness of the doctrine itself should be established by conclusive reasoning, or it should be shown that the particular doctrine, though supported by a long array of decisions, is not in accord with some accepted principle of law. If a textbook is to have authority, it must, therefore, be something more than a collection of authorities.

I have used largely Bigelow's excellent book, "The Law of Bills, Notes, and Cheques"; Ames' "Cases on Notes and Bills"; and "The Negotiable Instruments' Law"; citing many decisions under that law, as well as earlier decisions. Many more might have been added but for the limitations of space. I have borrowed largely from Ames' "Index-Digest" to his collection of cases because his admirable terse statements cannot be bettered.

CHAPTER I

DEFINITIONS

In entering upon the study of the Law of Bills and Notes we must first learn what a bill is and what a note is.

§ 1. Bill of Exchange. The word "bill" has many meanings. In connection with our subject it means a bill of exchange.[1] But what is a bill of exchange?

It is an order or draft in writing, signed by one person and addressed to another, to pay, on demand, or at a fixed or determinable future time, a stated sum of money, to the order of a specified person, or to bearer.[2]

Its Essentials. The essentials of a bill of exchange are: The signature of the person making the order, who is called the drawer; the name and address of the person upon whom the draft is made, who is called the drawee; the name of the person to whom the designated amount is to be paid, who is called the payee; the sum to be paid; the date when the draft is made; the date when the amount stated is to be paid, or the means for determining the time, as where the bill is made payable at sight, or a certain time after sight ("sight" meaning presentment for payment).

Place Where Bill is Drawn. The drawer and the drawee may be the same person, but then the instrument is no longer a bill of exchange, but a promissory note. Under N. I. L. § 214, the holder may treat it as either. The drawer and the payee may also be the same person, as, where a person draws a bill to his own order and indorses it to a third person by writing across the back "Pay to ..... or order", or "Pay to the order of", or "Pay to bearer"

[1] Negotiable Instruments Law § 2.

[2] N. I. L. § 1, 210; Westberg v. Chicago Lumber Co., 94 N. W., 572, 1903; Amsinck v. Rogers, 189 N. Y. 252, 93 N. Y. Supp. 87, 1905, 189 N. Y. 252, 1907; Buttrick Lumber Co. v. Collins, 89 N. E. 138, 1909; Columbian Banking Co. v. Bowen, 134 Wis. 218, 114 N. W. 451, 1908.

with his name following these words. The drawee of a bill of exchange becomes liable only when he accepts it,[3] which is usually done by his writing his name across the *face* of the instrument. He then becomes the acceptor.

§ 2. **Foreign and Inland Bills.** Bills of exchange may be foreign bills of exchange (sometimes called outland bills of exchange), or inland bills of exchange.[4]

In a foreign bill of exchange the drawer and drawee are residents of different countries or states. If both live in the same country, it is an inland bill of exchange. The different states of the United States are foreign to each other in this respect.[5]

§ 3. **Form of a Bill of Exchange.** A bill of exchange, foreign or inland, is substantially in the following form:

$..... New York, N. Y., ...19..
.....pay to.....or order
.....dollars and
charge the same to the account of
.....
To.....
No.....

§ 4. **Bill of Exchange May Be in Sets.** Bills of exchange, especially foreign bills, are often drawn, for safety in transmission, in a numbered set of two or more, generally three, each containing a provision that it is payable only in case the others are not paid. In such case, the whole of the parts constitute one bill.[6]

§ 5. **Promissory Note.** A promissory note is an absolute promise in writing, signed by the maker, to pay a specified sum at a certain time therein stated or limited, or on

[3] N. I. L. § 211; Balt. & O. R. R. Co. v. Bank, 47 S. E. 837, 1904; Wadhams v. Portland Co., 79 Pac. 597, 1905.

[4] N. I. L. § 213; Bank v. Bright, Coy & Co., 120 S. W. 648, 1909.

[5] N. I. L. § 213.

[6] N. I. L. § 310; Caras v. Thalmann, 123 N. Y. Supp. 97, 1910.

demand, or at sight, to a person therein named, or to his order, or to bearer.[7]

§ 6. Negotiability. Bills and notes may be negotiable or non-negotiable. Negotiability means that such instruments (including checks) may pass from hand to hand, by delivery, as money does, and that the person so receiving them thereby obtains good title to them and may give like good title by like delivery to another. If a person buys a horse or other personal property of a thief, even if he pay full value for it, he gets no title to it and the true owner may at any time claim his horse. *"Caveat emptor"* (let the purchaser beware) is the rule of the common law. But if one receives money or a promissory note or other negotiable instrument of a thief, in good faith, for value, he acquires a good title and he can exchange or sell either the money or the instrument, and the taker gets like good title.

How Made Negotiable. To be negotiable, an instrument must be made payable to order or to bearer. Without these words it is not a negotiable instrument. In our study of this subject the word instrument will be used as meaning "negotiable instrument" only, and this is in accordance with N. I. L. § 2.

Form of Negotiable Promissory Note. A negotiable promissory note is substantially in the following form:

$.....

New York, N. Y., ..., 19..

..... after date .... promise to pay to the order of .....

..... Dollars.

at .....

.....

The words "value received" often added to bills and notes, are immaterial.[8]

[7] N. I. L. § 320; Zander v. New York Sec. Tr. Co., 78 N. Y. Supp. 900, 1902; Wettlaufer v. Baxter, 125 S. W. 741, 1910.

[8] Franklin v. March, 6 N. H. 364, 1833, N. I. L. § 25 (2).

§ 7. Check. A check is a written order upon a bank or banker to pay a designated sum on demand out of the funds of the drawer of the check on deposit with the bank or banker that the check is drawn on.[9] A check (or cheque, as it is spelled in England) is substantially in the following form:

No .....

New York, N. Y., ..., 19..

..... Bank

Pay to the order of .....

..... Dollars. $.....

.....

§ 8. Certificate of Deposit. A negotiable certificate of deposit may be defined as the written statement of a bank that it holds a specified sum of money subject to the order of a certain person.

Form of. The following form may be said to include the essentials of a negotiable certificate of deposit:

(Name of Bank or Trust Co.)

(Place, State, Date)

$..... Certificate of Deposit. No. .....

This is to certify that .....

..... of .....

has deposited in the

.....

..... Dollars

payable with interest at the rate of .... per centum per annum (on demand) (on demand after ..... days' notice) to said ..... or order upon surrender of this certificate.

.....,

President.

.....

Cashier.

[9] N. I. L. § 321; Schlesinger v. Kuzrok, 94 N. Y. Supp. 442, 1905; Baltimore & O. R. R. Co. v. Bank, 47 S. E. 837, 1904.

Negotiable certificates of deposit vary in form and some contain additional clauses. Some provide that the deposit must remain a stated time to be entitled to interest, or if drawn at any other time will be entitled to a lower rate of interest, or with interest payable only at stated periods, generally twice a year. Some contain a proviso that the bank may change the rate of interest, giving a certain number of days' notice to the depositor. Some provide that interest not drawn shall be added to the principal, or that additional deposits may be made and entries thereof made upon the certificate. For this purpose some certificates of deposit have ruled debit and credit spaces for further deposits and for withdrawals. In this case the certificate of deposit becomes a savings bank book made negotiable by adding words purporting negotiability.

§ 9. Bonds as Negotiable Instruments. In England, the courts long entertained a dread of making bonds negotiable instruments, but that they are negotiable instruments in the United States is now well settled in the leading case of White v. Vt. & Mass. R. R. Co., 21 Howard 575, 1858, a case the student is advised to study.

CHAPTER II

HISTORY OF BILLS AND NOTES

§ 10. The Common Law. The source of law in the United States, except Louisiana and the States that have followed her, is the Common Law of England. But, properly speaking, the laws of Bills and Notes formed no part of the Common Law, and its introduction, from what was known as the Law Merchant, into the Law of England was vigorously opposed by the English courts and especially by Lord Holt.

§ 11. The Law Merchant. In brief, the law merchant, so far as concerns our subject, is commercial law, the body of principles and rules drawn chiefly from the customs of merchants, by which the rights and duties or obligations arising in commercial transactions are determined. And as a part of the customs among merchants in different countries, it became a part of international law, the law observed between merchants of different nations.

§ 12. Foreign Bills of Exchange First Admitted in English Courts. It was natural, therefore, that the common law of England should first recognize the law merchant when cases arose between merchants, one in England and one on the continent, that is, in cases arising through foreign bills of exchange. But even in such cases the common-law courts of England entertained jurisdiction unwillingly and, therefore, only by slow steps. Before the law merchant crossed the English channel, English courts had determined their conception of contract, and of course all bills and notes are merchants' ways of evidencing their contracts.

As will be found to be the case also in other branches of law, the law merchant came into English law partly through acts of Parliament and partly through decisions of the courts in cases in which fictions in the pleadings played an

important part. The problem arose as to how to enforce obligations under the law merchant, as evidenced by foreign bills of exchange; at a time when the forms used in stating the causes of action were not such as to include such obligations. To do this, it became necessary to interpret the established forms used to recover damages for breaches of contract (called "*assumpsit*",[1] under the law of contracts) so as to include cases brought because of failure to pay an accepted foreign bill of exchange.

Fiction Adopted on Foreign Bills of Exchange. The fiction was adopted that the defendant, who had accepted the bill, had received the amount thereof from the person in another country who had drawn upon him for it, and this person, in turn, was supposed to have received it from the plaintiff, in consideration whereof, the defendant, by accepting the bill, drawn by his supposed principal in another country, had promised the plaintiff to repay the amount to him. Under this supposed state of facts all the requisites of a common-law action in *assumpsit* for the breach of a contract were present, that is, consideration, and privity (or legal connection) between the parties. These allegations were treated by the courts as formal only and, therefore, not to be denied or traversed, but to be accepted as proved, and this left it necessary to prove the real transaction only.

The student will find a wealth of learning on this subject in the case of Dunlop v. Silver, reported in 1 Cranch 367, in the Supreme Court of the United States. The careful study of this case is strongly recommended.

It must be remembered that the law merchant forced its way only gradually into recognition and acceptance in England. The judges were educated in the common law of England with a consequent sense of devotion to its forms, and its narrow though logical technicalities. It was the slow, but ever increasing pressure of commercial necessity that led to legislation and to the gradual moulding of old forms so that actions between merchants upon foreign bills of

[1] See Article "Common Law Pleading and Practice."

exchange finally became recognized and enforced in English courts.

§ 13. Actions on Inland Bills. Actions upon inland bills of exchange followed later. In the case of Bromwich v. Loyd, 2 Lutw. 1585, decided in 1696, Treby, C. J. said that actions on bills of exchange were extended at first only to merchants who were strangers and were trading with English merchants; and afterwards to inland bills between merchants trading with each other here in England; and after that, to all traders and dealers, and of late, to all persons, whether traders or not.

§ 14. Actions on Promissory Notes. In spite of the allowance of actions upon bills of exchange, whether foreign or inland, actions upon negotiable promissory notes met with renewed opposition from the courts and especially from Lord Holt, who held in the case of Clerke v. Martin, 2 Lord Raymond, 757, in 1703, that the maintaining of actions upon such notes was an innovation upon the rules of the common law, amounting to setting up a new sort of specialty, unknown to that law and invented in Lombard street, which attempted in these matters of bills of exchange to give laws to Westminster Hall. He said further that the continuing to declare upon these notes upon the custom of merchants, proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method as to declare upon a general "*indebitatus assumpsit*" (being indebted he undertook to pay) for money lent, etc.

§ 15. Origin of Inland Bills and Promissory Notes. But inland bills and promissory notes had been in general use in England since 1645, in consequence of the forcible borrowing of £200,000, by King Charles I., in 1640, from the merchants of London, who had lodged their money in the King's mint in the Tower of London, but which, "after this compulsory loan, was never trusted in that way any more." In consequence of the civil war, merchants deposited their gold with the goldsmiths, who, thereupon, entered upon the

business of banking and of discounting the merchants' bills and notes.[2]

Their Recognition by the Courts. It became necessary, therefore, to provide that actions should be allowed to be brought upon promissory notes, to overcome Lord Holt in Clerke v. Martin, as above, and in Potter v. Pearson, 1 Lord Raymond 759, 1702; Burton v. Souter, 2 Lord Raymond 774, 1702; and Butler v. Crips, 6 Mod. 30, 1703. In the latter case, Holt, C. J. said:

"The notes in question are only an invention of the goldsmiths in Lombard street, who had a mind to make a law to bind all those that did deal with them."

Here is an instance of the futility of resistance by courts to the adoption of custom as law, where supported by public opinion and the necessities of the times.

§ 16. Statute of 3 & 4 Anne, C. I, 1704. But Lord Holt did not give way until the merchants went to parliament and secured the passage of the statute 3 & 4 Anne, C. IX., 1704, providing that promissory notes may be assigned or indorsed and that actions may be maintained thereon as on inland bills of exchange.

§ 17. Legal Recognition of Checks. It was contended for a long time that a check stood upon a different footing and that it was a kind of a bill of exchange upon which an action could not be maintained against the drawer. But it was decided in Grant v. Vaughan, 3 Burr. 1516, in 1764, that such an action will lie. The student is advised to study this case carefully.

§ 18. Influence of Common Law on the Law Merchant. In the trial and decision of these cases the judges, who had been brought up under the common-law system of England and were consequently not versed in the law merchant, naturally did all they could to mould the law merchant—when called upon to enforce it—into conformity with the common law. The result was, and is now, that the law of

[2] See 1 Anderson's History of Commerce 386, etc.

bills and notes (to its detriment) has many marks of the common law, where adherence should have been given to the principles of the law merchant.

§ 19. **The Law Merchant an Independent System.** It is necessary to guard against the idea that the law merchant is inferior and subordinate to the common law. On the contrary, it is a system by itself (of which the custom of merchants as to bills and notes is but a part) like admiralty or equity, and controls in a field where the common law did not extend. As Bigelow well states in "The Law of Bills, Notes, and Cheques", p. 71, quoting Lord Bowen concerning the decision in the case of the Mogul Steamship Co. v. McGregor, 23 Q. B. 612, affirmed 1892, A. C. 25, "Law should follow business," and, as Bigelow concludes: "Freedom of contract is the clear note of sound political economy and should, therefore, have its course."

Development of the Law of Bills and Notes. The student is advised to read the case of Dunlop v. Silver, 1 Cranch 367, in the Supreme Court of the United States, in 1804, and to compare it with the case of Bromwich v. Loyd, 2 Lutw. 1585, 1696, reported in the law French of the reports of that period, and he can then see the great development there was in the law of bills and notes between 1696 and 1804.

CHAPTER III

ESSENTIAL REQUISITES

§ 20. Consideration. We have seen already that to fit cases arising under bills and notes into the procedure adopted in cases arising under contract, it was assumed, by a fiction of law that it was not allowable to deny, that there was a consideration given for the bill. As the law on this subject developed, the fiction was dropped and the plaintiff's statement of his cause of action (called the declaration) was that the defendant had become liable by the custom of merchants. Here it should have remained, but later another change was made and still continues, in consequence of which, there is a short statement of consideration.

Without going at any length into the law of contract under the English system of common law, it is enough to say that that law requires some "consideration" to sustain any contract. Under the law merchant every maker of a negotiable promissory note, every person who wrote his name on its back (who indorsed it, from the French word *dors,* meaning back), every person upon whom a bill of exchange was drawn and who accepted it by writing his name across the face of the instrument, every person to whose order such a bill was made payable, after indorsing it, became liable on the instrument, not because the bill or note originated in some transaction based upon a valuable consideration, but because such maker, indorser, or drawee had obligated himself to pay the amount of the instrument. If the instrument passed into the hands of a third person for value (known in law as a purchaser for value without notice of any antecedent defect), the obligation of the instrument could be enforced against the maker, indorser or drawee (after accepting), even though he were an accommodation party only.

§ 21. Accommodation Party. An accommodation party is one who merely lends his name without compensation therefor, and who has no interest in the instrument. It is clear that under the common law an accommodation party was not liable, for there was no consideration given for his signature. To reconcile these differences between the two systems of law, the courts held there was a presumption that there was a valuable consideration to support the promise to pay, as evidenced by the signature of the party sought to be charged and, further, that negotiable instruments partook of the nature of specialties, that is, of instruments under seal, which required no consideration, the seal implying a consideration, as the courts said. (This matter will be considered later on.)

Liability of. But any question on this point is now settled by the express statement in § 50 of the N. I. L.

"Every negotiable instrument is deemed *prima facie* to have been issued for a valuable consideration and every person whose signature appears thereon, to have become a party thereto for value."

§ 22. Words of Negotiability. How does the law merchant make known the existence of this quality of negotiability, which is essential to bring an instrument within the operation of the principles of the law merchant? Simply by the use of the words "order" or "bearer." No instrument is negotiable (like gold coin) unless by words or clear meaning it is made payable to *A* or order; to the order of *A* or to bearer.

If an instrument is made payable to *A*, it is not a negotiable instrument and is not enforceable under the law merchant or the negotiable instruments' law (N. I. L. § 20). It must be sued upon as any other contract is sued upon and not as a negotiable instrument is sued upon. It is not within the scope of our study nor of the negotiable instruments' law.

§ 23. Form of Negotiable Instruments. A negotiable instrument must be in writing (N. I. L. § 20) which but affirms the rule of the law merchant.

May be in Pencil. It is not indispensable that it be written in ink; it may be written in pencil.[1]

When Under Seal. It should not be under seal, under the law merchant, but this is changed by the N. I. L. § 25 subdiv. 4, which accords with the better view that a seal on a negotiable instrument is merely surplusage (except in the case of a corporation).[2]

The student will find it necessary to learn and remember the following definitions: maker, payer, payee, drawer, drawee, acceptor, indorser, indorsee, and holder.

§ 24. Definitions. The maker is one who signs a promissory note.

The drawer is one who signs a bill of exchange.

One who signs a check is called the drawer or maker.

The payee is one to whose order a bill, note, or check, is made payable.

A party upon whom a bill or check is drawn is called the drawee.

He who accepts a bill drawn upon him becomes the acceptor.

One who writes his name on the back of an instrument, whether he be the payee, or any other person, is an indorser, and any one to whom an instrument is transferred or sold, made payable to his order, is the indorsee or holder.[3]

§ 25. Who Is Primarily Liable. The person primarily liable on an instrument is the one who, by its terms, is required to pay it. All other parties are secondarily liable,[4] and the note thereon by John J. Crawford (the draftsman of this law in his Annotated edition of the N. I. L.).

§ 26. Bill Must Contain an Order to Pay. The King v. Eller, 1 Leach Cr. L. 323, 1784; Ruff v. Webb, 1 Esp. 129, 1794; Little v. Slackford, M. & M. 171, 1828, (but this case is doubtful); Norris v. Solomon, 2 M. & R. 266, 1840.

[1] Geary v. Physic, 5 B. & C. 234, 1826; Brown v. Butchers' Bank, 6 Hill (N. Y.) 443, 1844; Reed v. Roark, 14 Texas 329, 1855.

[2] Manufacturing Co. v. Bradley, 105 U. S. 175, 1881.

[3] N. I. L. § 2.

[4] N. I. L. § 3.

What Constitutes an Order. This does not mean, however, that payment must be expressly ordered. It is enough if it is clearly made to appear that it is the will of the drawer that the amount of money stated shall be paid. In Bissenthal v. Williams, 1 Duv. (Ky.) 329, 1864, "Please let the bearer have $50. I will arrange it with you this noon," was held to be a valid bill of exchange. But if the person to whom this was addressed had no funds of the writer in his hands, would it be anything more than a request for a loan which he would arrange at noon? If it be in this form: "Mr. ..... will oblige the undersigned by paying ....., or order, the sum of ..... dollars," it is left to the awakening legal insight of the student, in the light of the authorities above quoted but not always reconcilable with each other, to determine whether it would be a valid bill of exchange, adding, however, that the use of words of negotiability ("order" or "bearer") have been held to furnish evidence of an intention to make it a bill. It is the writer's object to awaken the reasoning powers of the student, so that when admitted to the bar and a client comes with a question like this, he will be able to reason the matter out, as well as to turn to the authorities on the subject.

"Bill". In this connection, study the definition given in the N. I. L. § 210: "A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed, to pay on demand, or at a fixed or determinable future time, a sum certain in money, to order or to bearer."

Every Negotiable Instrument Must Contain A Promise. It is even more difficult to determine what constitutes a promise than it is to determine what constitutes an order. In Cashborne v. Dutton, Selwyn's *Nisi Prius,* 12th ed., 329, 1727, "I do acknowledge myself to be indebted to ..... in £..... to be paid on demand, for value received" was held to be a good note. But was this right? Where are there any words showing it to be negotiable? Evidently it is non-negotiable and, therefore, no suit could be brought

upon it as a negotiable instrument. And is it anything more than an acknowledgment of indebtedness? For these reasons a form more often used in England than in the United States, "I O U eight guineas," is merely an acknowledgment of a sum due and is not a note.[5] So with "Due ..... $17.14"[6]. Without a promise to pay, although an admission that a stated sum of money is due, cannot be turned into a promise to pay it. In Russell v. Whipple, 2 Cowen, N. Y. 536, 1824, "Due Lanson Russell, or bearer, one day from date, two hundred dollars twenty-six cents, for value received; as witness my hand this sixth day of January A. D. 1823," was held to be a good promissory note. The student may reason out for himself whether this was correctly decided. And what is his opinion of the following decisions?[7]

§ 27. Promissory Note. In like manner a promissory note includes a promise to pay.

What Constitutes A Promise. It is not maintained that the word "promise" *must* be used. Whatever shows explicitly the will or purpose of the maker to pay, has often been held to be equivalent to a promise, although sometimes with undue stretch of meaning. N. I. L. § 20 provides that to be negotiable an instrument must be in writing and must contain an unconditional promise or order to pay a sum certain in money. Judged by this standard, while doubtless some of the forms used in the above cases were such as to enable the holder to sue for breach of contract, they were not negotiable promissory notes and were not suable upon as such. Thus, a note promising to pay so many pounds upon demand "or to render the body of *A* to the Fleet Prison," is not a promissory note.[8] The student can now decide whether Andrews v. Franklin, 1 Str. 24, 1717, and

[5] Fisher v. Leslie, 1 Esp. 429, 1795.

[6] Currier v. Lockwood, 40 Conn. 349, 1873.

[7] Johnson v. Johnson, Minor (Ala.) 263, 1824; Bacon v. Bicknell, 17 Wis. 540, 1863; Manigan v. Page, 4 Humph (Tenn.) 247, 1847; Carver v. Hayes, 47 Me. 257, 1859; Sacket v. Spencer, 29 Barb. (N. Y.) 180, 1859.

[8] Smith v. Boheme, Gilb. 93, 1714.

Appleby v. Biddolph, 8 Mod. 363, 1717, were correctly decided.

An instrument that is a note in form cannot be sued on as a negotiable instrument if the party taking it must inquire into an extrinsic fact before he can tell whether it is payable, as: "This note is given on condition that if any dispute shall arise between *A* and *B* respecting the *fir,* the note shall be void.[9] So a promise to pay "four years after date if I am then living, otherwise this note to be null and void" is not a negotiable instrument.[10] But, "I promise to pay to *A,* or his order, at three months after date, the sum of one hundred pounds, as per memorandum of agreement" was held to be a good promissory note, there being an absolute and unconditional promise as to the payer, the payee, the amount, and the date, and the words "as per memorandum of agreement" do not limit the absolute agreement.[11] It would seem then that Jenkins v. Caddo, 7 La. Ann. 559, 1852, was incorrectly decided.[12]

Negotiable Instrument Must be Payable in Money. This means that if it is payable in anything but money, it is not such a contract as the law merchant recognizes as a negotiable instrument. Nor is it such under the statutes requiring promissory notes to be payable in money, nor under the N. I. L. § 20, subdiv. 2. It is only an ordinary commercial contract. Thus, "We promise to pay *A* or order, $1,000 in cotton" is not a promissory note.[13] But difficulty arises when the question is whether it *is* money that the instrument is payable in. Thus a note: "Pay the bearer on demand one guinea in cash or Bank of England notes," upon indictment for forging and uttering a promissory note, was held not to be a promissory note.[14] A note in New Brunswick: "One year from date, for value received, I promise to pay to my order at the St. Stephen's Bank

[9] Hartley v. Wilkinson, 4 M. & J. 5, 1815.
[10] Braham v. Bubb, Chitty on Bills, 10th ed., 87, n. 12, 1826.
[11] Jury v. Barker, E. B. & E. 459, 1858.
[12] N. I. L. §§ 20, 22.
[13] Auenbach v. Pritchett, 58 Ala. 450, 1877.
[14] Rex. v. Wilcox, Bailey, Bills, 6th ed., 11, 1808.

$371, payable in U. S. currency," was held, although with some expression of doubt, to be payable in money, even though in the currency of another country, then fluctuating in value.[15]

The decision in Sawyer v. Stimpson, 8 Mass. 260, 1811, was to the same effect, ("payable in foreign money") while in Thompson v. Sloan, 23 Wend. (N. Y.) 71, 1840, it was decided that an instrument otherwise valid as a promissory note, "payable in Canada money," was not a negotiable note within the meaning of the statute. There has been a tendency to favor the instrument when made payable in local state currency.[16]

Sum Payable Must be Certain. This rule would seem to be so plain and simple as to be easy of application. Nevertheless, the courts have found great difficulty in applying it, and there are many decisions in conflict with each other. How can it be said to be certain, for instance, when the note reads: "If not paid at maturity and suit is brought thereon, I hereby agree to pay collection and attorneys' fees therefor".[17] In one event (if paid at maturity), one amount is due. In another event (suit brought, after failure to pay at maturity), another and an uncertain sum is due. Yet this was held to be a good negotiable note. But see N. I. L. § 2 (5).

Examples. In the case of First Nat. Bk. v. Gay, 63 Mo. 33, 1876, the note ran "and if not paid at maturity and the same is placed in the hands of an attorney for collection, we agree and promise to pay an additional sum of ten per cent as attorney's fee." Although the additional amount to be paid upon failure to pay the note at maturity is calculable precisely (which it is not, when "the cost of collection" is to be added), this was held not to be a negotiable promissory note, the court correctly saying of the above case of Sperry v. Horr and other similar cases: "We regard them

[15] The St. Stephen's Br. Ry. Co. v. Black, 2 Hannay 139, 1870.

[16] Searcy v. Vane, Martin & Yeager (Tenn.) 225, 1827; Cockrill v. Kirkpatrick, 9 Mo. 697, 1846; White v. Richmond, 16 Ohio 5, 1847.

[17] Sperry v. Horr, 32 Iowa 184, 1871.

as seriously endangering elementary principles and definitions," an expression of opinion that ought to be more closely followed. Yet there have been so many cases holding that such clauses do not invalidate the negotiability of a note that it has been deemed wise to provide in the N. I. L. (§ 21, subdiv. 5, and see note in Crawford's Ann. N. I. L. to this section) that such instruments shall be negotiable. First Nat. Bk. v. Miller, 120 N. W. 820 (Wis.), 1909, and McCormick v. Swem, 102 P. 626 (Utah), 1909, are cases so holding under this section.

Suppose a note to order or to bearer to be made payable in instalments, but "in default of payment of the first instalment, the whole amount payable under this note is to become due and payable." Is it certain what the sum payable is? As in the last instances, in one contingency one sum is due, in another contingency a different sum is due. How can such an agreement be considered as similar to money or how can it take its place as its representative? The drafts drawn of old by merchants on each other and their notes to order, or to bearer, were free from the possibility of variations like these, as to the sum to be paid. Of course all these agreements should be enforced, and they can be, under their own proper remedy. But the only question we are now to consider is whether these are negotiable instruments in accordance with the custom of merchants. If not, they should not be enforceable as negotiable promissory notes. Although reasoning is against their allowance as being endowed with the quality of negotiability, so many cases have decided in favor of it that the N. I. L. § 21, subdiv. 3, recognizes them as negotiable.[18]

In Colehan v. Cook, Willis 393, 1743, the note was payable ten days after the death of the maker's father. The case was argued several times and was then wrongly decided by Chief Justice Willis. What is still more remarkable, the judgment was afterwards affirmed in the Court of

[18] Carlon v. Kenealy, 12 M. & W. 139, 1843; Wilson v. Campbell, 110 Mich. 580, 1896; Chicago Ry. Eq. Co. v. Merchants Bk, 136 U. S. 268, 1889.

King's Bench on a writ of error, 2 Str. 1217, and was followed in later cases, such as Roffey v. Greenwell, 10 A. & E. 222, 1839 (where, however, the only question raised was as to the date from which interest should begin to run).[19] The reason given by Willis for holding the note in Colehan v. Cook, to be negotiable, was that the statute 3 & 4 Anne C. IX is silent as to the time of payment. There is a familiar principle of law that the learned Chief Justice should then have remembered and applied, that is, in the absence of any express statement to the contrary in the statute, the rule of the law merchant should be followed, and that rule was, that certainty of time of payment is a requisite of negotiability. By this custom of merchants negotiable bills and notes took the place of money. But if the time of payment is to depend upon the death of the maker, the conclusion of war, the next eclipse of the moon, or any extrinsic event, which, though eventually to happen, but *when* to happen is unknown, it certainly is not a negotiable instrument. In such a case no indorser can tell on what day certain, his liability is to mature, but must watch from day to day and every day, for extrinsic knowledge of the happening of the particular event. No custom of merchants ever recognized such instruments to be negotiable.

It is a source of satisfaction to find that this case was virtually overruled in Alexander v. Thomas, 16 Q. B. 333, 1851, although the report of the case furnishes no evidence that the learned justices realized they were overruling it. In that case the bill was payable "ninety days after sight, or when realized," meaning, "or when you are in funds for that purpose." It was decided that this was not a good bill of exchange, drawn according to the custom of merchants.

Certainty of Time of Payment a Requisite To a Negotiable Instrument. The correct rule is laid down in Brooks v. Hargreaves, 21 Mich. 254 at 260, 1870, that is, if a note

[19] Bristol v. Warner, 19 Conn. 7, 1848; Mortee v. Edwards, 20 La. An. 236, 1868 (payable 30 days after peace between the Confederate States and the United States); and Conn. v. Thornton, 46 Ala. 587, 1871.

is made payable at a time which cannot be made certain, it cannot be regarded as a negotiable note.

One important lesson is to be learned from our study of the decision in Colehan v. Cook, Willis 393, 1743. That is, however high the reputation of the judges, the student must not follow any case blindly, but must think it out for himself, consult other cases on the same question, and then decide himself whether the decision is right, on principle. That is the way to become lawyer enough to give advice worth anything to clients.

Note Payable on Demand if no Time is Specified. When no time of payment is specified, the conclusion of law is that it is payable immediately (Herrick v. Bennett, 8 Johns. N. Y. 374, 1811), that is, it is payable on demand.[20] In Messmore v. Morrison, 172 Pa. Stat. 300, 1896, such a note was held to be payable forthwith without demand.

Any condition or contingency expressed in the instrument "would have the effect to reduce the instrument from the high level of the law merchant to the lower level of the common law," as Bigelow well puts it, p. 10, "Bills, Notes, and Cheques." (N. I. L. § 20). Thus, an order upon a savings bank, payable to order or to bearer, but with the additional words, "The bank book of the depositor must accompany this order," is not a negotiable instrument.[21]

A promise in writing to pay to *A* or order, a stated sum, "out of the net proceeds of ore to be raised and sold from" a specified bed of ore, is not a negotiable note (Worden v. Bodge, 4 Denio N. Y. 159, 1847), for there may be no ore raised, or if raised, there may be none sold from that bed, or it may be worthless when raised, and so no proceeds may be derived from it.

Nor is it enough that the condition has been performed or that the contingency has arrived. Thus, a note agreeing to pay $1,000 when the maker is twenty-one years of age, to the order of *A*, is not a negotiable instrument, even after

[20] N. I. L. § 26, subdiv. 2, and cases cited.

[21] Iron City Nat. Bk. v. McCord, 39 Pa. Stat. 52, 1891; White v. Cushing, 88 Me. 339, 1896.

the maker is twenty-one years old. For he might have died before reaching twenty-one.[22]

In Iowa Nat. Bk. v. Carter, 123 N. W. 237 (Iowa), 1909, it was held that notes secured by chattel mortgage are not negotiable under the N. I. L., because, in case of default in payment of the note, the payee might, at its option, declare any and all other notes given for the purchase price, to be due and payable. It is doubtful, however, whether this decision is right under §§ 21 and 24 of the Negotiable Instruments Law, and under the decisions reached in many states.

§ 28. Deposited or Mortgaged Security. It is clear that the statement in a note that certain property is deposited or mortgaged as collateral security and may be sold if the instrument is not paid at maturity, will not prevent the note from being negotiable. Nor is a note non-negotiable because it authorizes confession of judgment if the instrument be not paid at maturity.[23] But a note containing a power of attorney to enter judgment upon it at any time after its date "whether due or not" is not negotiable.[24] The N. I. L § 22, "following custom and hence sound reason," as Bigelow says, provides that a note is still negotiable though it indicates a particular fund out of which reimbursement is to be made, or contains a statement that a particular account is to be debited with the amount, or contains a statement of the transaction which has given rise to the instrument.[25]

A note to order, payable "as soon as the crop can be sold or the money raised from any other source" is not negotiable.[26] But "certainty" here, does not mean "definiteness". For promises to pay "on demand", "at sight", "..... days after demand," "..... days (or months) after date," etc., are all in common use and are negotiable

[22] N. I. L. § 23, and especially see Wray v. Miller, 120 N. Y. Supp. 787, 1910.

[23] N. I. L. § 12, subdiv. 2.

[24] Wis. Yearly Meeting of Friends v. Babler, 91 N. W. 678, 1902.

[25] Hibbs v. Brown, 190 N. Y. 167, 1907.

[26] Nunez v. Dautel, 19 Wall. 560, 1873.

notes. It is probably due to the fact that judges have not been educated in the law merchant but in the common law, that there is a manifest disposition to consider instruments as negotiable that under the law merchant would not be considered as negotiable. A marked instance is that of Works v. Hershey, 35 Iowa, 410, 1872, in which "I promise to pay *A* or order, $1,000 when convenient," was held to be a promise to pay within a reasonable time and, therefore, to be negotiable. The custom of merchants has never recognized a loose indeterminate promise like this as a negotiable instrument. In this case "convenient" meant at the convenience of the maker of the note, and it might never be convenient for him to pay.

§ 29. Certainty as to Parties. There may, however, be uncertainty as to who is the maker or drawer, drawee, and payee. In McCall v. Taylor, 34 L. J. R. 365, 1865, the instrument read "Four months after date, pay to my order, the sum of three hundred pounds for value received." There was no date nor signature. It was addressed "To Captain Taylor, ship 'Jasper,'" and the defendant had written across the face "Accepted, William Taylor." The date was essential, for without it no one could tell when the four months had elapsed. There being no signature, and no drawer, it was neither a bill nor a note. It was not a negotiable instrument.

In Shuttleworth v. Stephens, 1 Camp. 407, 1808, a dated instrument ran, "Two months after date pay to the order of John Jenkins £78, 11s. value received. Thomas Stephens, at Messrs. John Morson & Co." Lord Ellenborough held that this was properly declared on as a bill of exchange; and that Morson & Co. might be considered as the drawees, although perhaps it might have been treated as a promissory note, at the option of the holder. This accords with the N. I. L. § 36, subdiv. 5.[27] And when the drawer and the drawee are the same person, the holder may likewise treat

[27] Heise v. Bumpass, 40 Ark. 545, 1883.

the instrument at his option, either as a bill of exchange or a promissory note.[28]

A promise to pay to *A*, or to *B*, or to his or their order, is not a negotiable instrument, because there is no certain payee.[29]

In Cowie v. Stirling, 6 E. & B. 333, 1856, *A* promised to pay to the secretary for the time being of the I. L. Society, C 20,000, nine months after date. It was held not to be a negotiable note on account of uncertainty as to the payee. Such a note would have to be held until maturity, before indorsement by the secretary but such is not the nature of negotiable instruments. If indorsed before maturity, and the secretary should die, there would be grave question as to its character and status. The court found it to be "a floating promise, the performance of which was to be made to the person being secretary when the document became due."

It is difficult to explain why the court did not say, at once, in this case, that it was a non-negotiable note, there being no words of negotiability used in the note. This would have disposed of the case.

It is held that the payee of a bill is certain, when it is made payable to the owner of ..... on the ground that thereby authority was given to fill in the blank with any name. The defendant, by leaving the blank, undertook to be answerable for it, when filled up in the shape of a bill.[30]

There is an attempt in Adams v. King, 16 Ill. 169, 1854, to include cases where "the payee is so certainly described or referred to, as to be easily ascertained by allegations and proofs," but the principle of the law merchant is broader than this. In Jacobs v. Benson, 39 Me. 132, 1855, even a mistake in the name of the payee was allowed to be corrected, upon suit on the instrument. The payee need not be designated by name. If his identity can be ascer-

[28] N. I. L. § 214.

[29] Blanckenhagen v. Blundell, 2 B. & A. 417, 1819.

[30] By Lord Ellenborough, C. J. in Crichley v. Clarance, 2 M. & S. 90, 1813.

tained with certainty, it is enough. Thus, in the United States v. White, 2 Hill (N. Y.) 59, 1841, a promissory note made payable "to the order of the person who should thereafter endorse the same," was held to be negotiable. By the N. I. L. § 27, subdiv. 5, an instrument may be made payable to "one or some of several payees", but this changes the law as determined in many prior cases.[31]

§ 30. Negotiability Depends Upon Delivery. Thus, the writing and signing a note on Sunday is not a contract (and, therefore, open to the objection of being entered into on a Sunday, contrary to a state law) unless it is also delivered on that day.[32]

Where the payee named in a note made off with the note before the maker intended to deliver the note to the payee, there was no delivery. Being thereafter put in circulation against the maker's directions, and without his fault or negligence, it cannot be recovered upon, even by an innocent holder.[33] This is upon the theory that in reality there never was a promissory note because an instrument does not come into existence, until delivered as intended. Under the N. I. L., however, § § 90 and 91, an innocent purchaser for value without notice of any infirmity in the instrument, or defect in the title of the person negotiating it, may enforce payment of the instrument for the full amount thereof, against all parties liable thereon, Greeser v. Sugarman, 37 Misc. (N. Y.) 799, 1902; Moak v. Stevens, 91 N. Y. Supp. 903, 1904; Stouffer v. Curtis, 85 N. E. 180 (Mass), 1908, which does not cite the N. I. L. although it was in force in Massachusetts when this case arose, the decision holding that a bill does not come into existence until delivery as intended. This is true, in case of suit between the original parties, but not when suit is brought by an innocent purchaser for value without negligence or fraud on his part, as in Buzzell v. Tobin, 86 N. E. 923 (Mass.),

[31] Bigelow p. 24.

[32] Flanagan v. Meyer, 41 Ala. 132, 1867.

[33] Benson v. Huntington, 21 Mich. 415, 1870; Boxendale v. Bennett, 3 Q. B. D. 525, 1878; see also the N. I. L. § 35.

1909; Paulson v. Boyd, 118 N. W. 841 (Wis.), 1908, but see the vigorous dissenting opinion; Madden v. Gaston, 121 N. Y. Supp. 951, 1910.

§ 31. Ambiguous Instruments. Where the instrument is so drawn as to leave it doubtful whether it is a bill or a note, the holder may sue upon it as either. In Edis v. Bury, 6 B. & C. 433, 1827, the instrument was to the maker's order, indorsed by him, but addressed to another person. The members of the court could not agree whether this was a bill or a note, but they agreed that the holder might treat it as either. In Miller v. Thomas, 3 M. & G. 576, 1841, a promise to pay £100 by a banking company through its general manager, addressed to itself, to the order of another person, was held to be a promissory note. The N. I. L. § 36, subdiv. 5, authorizes a holder to treat these ambiguous instruments as bills or notes.

CHAPTER IV

ACCEPTANCE AND INDORSEMENT

§ 32. Acceptance. The acceptance of a bill of exchange, whether foreign or inland, is the act whereby the drawee signifies his assent to the drawer's direction to pay the amount stated in the bill.[1]

Liability of Drawee after Acceptance. The drawee is not liable on the bill unless and until he accepts it.[2] The holder may, however, have his remedy against the drawer if he presents the bill duly, for acceptance, and it is not accepted within the prescribed time, and if he treats it as dishonored by non-acceptance.[3] The drawee has not entered into any obligation until he accepts the bill, either to the drawer or to the holder. So a bank is not liable to the holder of a check drawn by one who has a deposit in the bank the check is drawn on, unless and until it accepts or certifies the check,[4] because, by the very language of § 211, "a bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment thereof." In this connection the student must remember that a check is a bill of exchange drawn on a bank, payable on demand.[5]

§ 33. Acceptance Must Be in Writing. The acceptance must now be in writing and signed by the drawee.[6] The change in this respect is due to the statute 1 & 2 Geo. IV., 78, 1, 1821, which requires the acceptance to be in writing on the face of the bill. N. I. L. § 220, further provides that

[1] N. I. L. § 20.

[2] N. I. L. § 41.

[3] N. I. L. § 247.

[4] Baltimore & Ohio Ry. Co. v. First Nat. Bk. of Alexandria, 47 S. E. 837 (Va.), 1904.

[5] N. I. L. § 321.

[6] N. I. L. § 220; Izzo v. Luddington, 79 App. Div. (N. Y.) 272, 1903; Wadhams v. Portland V. & Y. Ry. Co., 79 P. 597 (Wash.), 1905; Seattle Shoe Co. v. Packard, 86 P. 845 (Wash.), 1906.

the drawee cannot stipulate to perform his promise to pay (as evidenced by his acceptance) by any other means than the payment of money. Obviously this is requisite that the bill may have full negotiability, such as money has. This was formerly the law, however, for in 1697 in Pettit v. Benson, Comberbach. 452, the words of acceptance were "I do accept this bill to be paid half in money and half in bills." Nevertheless, the holder might refuse such an acceptance and protest it so as to hold the drawer. The objections to allowing qualified acceptances were well stated by counsel in Wegersloffe v. Keene, 1 Str. 214, 1720.

Undue Retention of a Bill is Equivalent to Acceptance. If a bill is sent to the drawee for acceptance and he retains it in his possession, this amounts to an acceptance.[7] Under the N. I. L. § § 224 and 225, the drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill, but if he destroys it or refuses to return the bill, accepted or non-accepted, to the holder, he will be deemed to have accepted it. This applies also to checks.[8]

Acceptance, How Indicated. The well recognized custom of merchants long has been and is now, that acceptance is made known by writing the word "accepted" across the face of the instrument (followed, of course, by the signature of the drawee acceptor). It is not meant by this that acceptance can only be made manifest by the use of the word "accepted," but only that that is the usual and best method. The words "presented" or "seen" followed by the drawee's signature, or even the drawee's signature alone, is sufficient. Anything not putting a direct negative on the request of the drawer to pay, is enough.[9]

Acceptance—General or Qualified. Assent without qualification, as by writing the drawee's name across the face of the instrument, either with or without the usual word

[7] Harvey v. Martin, 1 Camp. 429, 1806; (Jeune v. Ward, 2 B. & A. 653, 1818, however, to the contrary.)

[8] Wisner v. First Nat. Bk. 68 At. 955 (Pa.), 1908; State Bank v. Weiss, 46 Misc. (N. Y.) 93, 1904.

[9] Spear v. Pratt, 2 Hill (N. Y.) 582, 1842.

"accepted" is general acceptance. A qualified acceptance, in express terms varies the effect of the bill as drawn. It is remarkable that no cases have yet arisen under this section of the N. I. L. It was a question long disputed in England, when a bill payable generally, was accepted payable at a particular place whether such an acceptance was a qualified one. It was finally decided by the House of Lords in Rowe v. Young, 2 Br. & B. 165, 1820, that the declaration in an action on such a bill, against the acceptor, must aver presentment at that place, and the averment must be proved. This decision led to the passage of the statute 1 & 2 Geo. IV., ch. 78, providing that an acceptance payable at a particular place should be deemed a general acceptance, unless expressed to be payable "only and not otherwise or elsewhere." This has been followed in § 228, which but expresses the weight of authority in the United States.[10]

Qualified Acceptance in Express Terms. This varies the effect of the bill as drawn, as, by making payment by the acceptor dependent on the fulfillment of a condition therein stated, or accepting to pay part only of the bill, or to pay only at a particular place, or qualifying the time of payment, or by being the acceptance of some one or more of the drawees, but not of all.[11] But the holder of the bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. N. I. L. § 230. No case having yet been decided under this section the student is referred to an old case, before this statute, the case of Cline v. Miller, 8 Md. 274, 1855. Further, as a qualified acceptance is not a compliance with the order of the drawer, both the drawer and indorsers up to that time not having assented, they are discharged from liability. But if they authorized the qualified acceptance or, subsequently, assented to it, they will be bound.[12] Assent to a qualified

[10] Wallace v. McConnell, 13 Peters 136, 1839.
[11] N. I. L. § 229.
[12] N. I. L. § 230.

acceptance will be presumed, after knowledge thereof, if the drawer and indorsers do not express dissent within a reasonable time.

Indirect Acceptance. There may also be indirect acceptance, as by a written acceptance on a separate paper; and acceptance for honor.

In a leading case in the Supreme Court of the United States, Coolidge v. Payson, 2 Wheat. 66, 1817, the opinion being delivered by Marshall, C. J., it was determined that a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, if shown to the person who afterwards takes the bill on the credit of the latter, is a virtual acceptance binding the person who makes the promise.

With all due respect to the great Chief Justice Marshall, it is confidently submitted that this decision was wrong. The famous English case on which he relies, Pillans v. Van Mierop, 3 Burr. 1663, is no longer considered valid. The trouble arises from mixing two different things, a bill and a letter promising to accept the bill. In an action upon the bill the defense of non-acceptance should be considered valid, in such a case. But that should not exonerate the defendant from liability, who promised to accept, if sued for a breach of his promise. The difficulty arises from the effort to impose a common-law liability in contract upon a different kind of liability under a different system of law, the liability under the law merchant concerning a bill of exchange, of an acceptor. This departure from principle has led to the unforeseen result that one who is not an acceptor under the law merchant may, nevertheless, be sued as an acceptor because, by his promise in a letter to accept, he is liable, under the law of contracts, to one who, relying upon his promise, has taken the bill. Of course he should be held liable for his breach of promise, but he should not be held liable as an acceptor of the bill, because he has not accepted the bill in the sense of the custom of

merchants.[13] These two cases merit careful study. It is to be regretted that the many conflicting and erroneous decisions on this subject have left the law in an unsatisfactory condition and have imposed upon the law of bills and notes recognition of acceptances that are not really acceptances according to the custom of merchants. § 222 of the N. I. L. limits the evil somewhat by declaring that where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor, except in favor of a person to whom it is shown, and who, on the faith thereof, receives the bill for value. All this difficulty might have been avoided, if, when suits were brought against the alleged acceptor, the courts had declined to receive testimony outside of the bill itself, purporting to show acceptance. In other words, acceptance of a bill, according to the custom of merchants, means written acceptance on the bill itself.

Only one case of this kind has arisen under the N. I. L., First Nat. Bk. of Atchison v. Commercial Savings Bk., 87 P. 746 (Kans.), 1906. Without expressing an opinion upon the correctness of this decision, the student is asked to study the case and decide this himself, adding only that this is just the kind of question he may be called upon to answer, not only in a law examination, but in the actual practice of law.

Acceptances as specified are operative only between drawer and drawee except in those cases where the bill has come again into the possession of the owner.

Acceptance for Honor. According to the custom of merchants in England, and to a certain extent in the United States also, an acceptor for honor agrees to pay the amount designated in the bill upon two conditions: that a further presentment of the bill to the drawee for payment shall be made at its maturity; and that if then dishonored (meaning not paid) it shall be protested again; and due notice of the dishonor shall be given to the acceptor for honor.[14]

[13] See further the case of Exchange Bk. of St. Louis v. Rice, 98 Mass. 288, 1867, limiting the doctrine somewhat.

[14] N. I. L. §§ 283, 284, 286.

Acceptance for honor (or *supra protest,* as it is also called) has not been much in use in the United States, but in England it has been recognized by law as actual custom. It has been made a part of the N. I. L. to bring that law into uniformity with the English act and thus to make uniform the law of bills and notes throughout the English speaking world. Not a case has yet arisen in the United States under the N. I. L. as to acceptance for honor, or *supra protest,* in any state that has adopted this law, and, therefore, we need give the subject but little consideration beyond learning what it is. It must be in writing, indicating that it is an acceptance for honor and it must be signed by the acceptor for honor.[15] A bill may be accepted for honor, where it has been protested for dishonor, by non-acceptance, or protested for better security and is not overdue, by any person not a party already liable thereon, who, with the consent of the holder, may intervene and accept the bill *supra protest,* for the honor of any person liable thereon, or for the honor of the person for whose account the bill is drawn.[16]

Referee in Case of Need. Sometimes the bill contains a reference by the drawer to some person to whom the holder may present the bill for acceptance "in case of need", that is, upon the refusal of the drawee to accept.[17] The form used is "In case of need, apply to ....." Such person is called the referee in case of need. The holder may resort to him or not, as he may see fit.

Drawee Only can Accept, Except for Honor. This was determined to be the law according to the custom of merchants by Lord Ellenborough in Jackson v. Hudson, 2 Camp. 447, 1810, where it was held that if a bill be drawn upon one man, it cannot be accepted by him and another, so that that other person can be sued as an acceptor of the bill. The acceptance of a stranger to a bill is mere surplusage, unless he be acceptor for honor. We have already

[15] N. I. L. § 281.
[16] N. I. L. § 280.
[17] N. I. L. § 215.

seen that under N. I. L. § 220 the acceptance must be in writing and signed by the drawee.

Acceptance Complete without Delivery. The delivery of a bill or note is necessary only for the purpose of creating or transferring title. An acceptance has no effect upon the title to the bill and is, therefore, held to be complete the moment it is written upon the bill with the intention of accepting. This is said to be the result of the decision in Wilde v. Sheridan, 21 L. J. Rep. 260, 1852, holding that the cause of action arose where the acceptance was made and not where the plaintiff (drawer) received it. Consistently with this view, a cancellation of an acceptance made before delivery would be nugatory, and the opinions of Lord Kenyon and Lord Ellenborough to that effect in Bentinck v. Dorrien, 6 East. 199, 1805, is more in accordance with the custom of merchants than the decision in Cox v. Troy, 5 B. & A. 574, 1822, which overruled them. The question is definitely settled now, however, by N. I. L. § 35, providing that every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. Therefore, as the law is now established, if one has accepted a bill, and while it is still in his hands before re-delivery to the holder, circumstances arise that seem to such acceptor to call for a revocation of his acceptance, he may strike out his acceptance without fear of a continuing liability to be sued as acceptor. It has been held, under N. I. L. § 35, that a bill of exchange payable to the order of the drawer, does not come into existence as a bill until it is delivered, as well as indorsed, by the payee.[18] Where the plaintiff is an indorser of a check in due course with all the rights appertaining to such title, it is no defense against him that the check had been unlawfully put in circulation by the defendant's clerk without authority.[19]

§ 34. Indorsement Must Follow Tenor of Instrument. Therefore, an indorsement directing payment of part of a

[18] Stouffer v. Curtis, 85 N. E. 180, 1908.
[19] Buzzell v. Tobin, 86 N. E. 923, 1909.

bill to *A*, and part to *B*, is not an indorsement according to the custom of merchants.[20]

Upon principle, an indorsement varying the time of payment from that stated in the instrument is not a valid indorsement, but the old cases are at sea on this point.[21] In Harvey v. Sangston, 3 Dana (Ky.) 246, 1835, this is correctly called an assignment, for it is not really an indorsement. It would be well to confine the use of the word assignment in this connection, to the transfer of non-negotiable instruments and other chattels, and to designate the transfer of title to a negotiable instrument as indorsement.

§ 35. Indorsement and Guaranty. If one to whose order a note is payable writes on the back "I hereby guarantee the above note", he becomes a guarantor and not an indorser. He is, therefore, not liable thereon as indorser.[22]

Indorsement—In Whose Name. A person who is known by several names may indorse in the name of any one of them, although different from the one by which the bill was made payable to him.[23]

An Indorsement Must be in Writing. Thus, a promise to procure indorsement is not indorsement.[24] N. I. L. § 61, provides that the indorsement must be written on the instrument itself or upon a paper attached thereto (which is known as an "allonge" from the French, to lengthen). An indorsement is usually written on the back of the instrument, but it may be written on it anywhere, provided it is done with the intention of indorsing it.[25]

When Signature is Deemed an Indorsement. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making it intended to

[20] Hawkins v. Cardy, 1 Lord Ray 360, 1698; Douglas v. Wilkeson, 6 Wend. (N. Y.) 637, 1831; Frank v. Kaigler, 36 Texas 305, 1871; N. I. L. § 62.

[21] East v. Essington, 7 Mod. 86, 1703; Smallwood v. Vernon, 1 Str. 478, 1721.

[22] Belcher v. Smith, 7 Cush. (Mass.) 482, 1851.

[23] Bryant v. Eastman, 7 Cush. (Mass.) 11, 1851; The Chillicothe Branch v. Fox, 3 Blatch. (N. Y.) 431, 1856. See to the same effect, N. I. L. § 37.

[24] Moxon v. Pulling, 4 Camp. 50, 1814.

[25] Young v. Glover, 3 Jurist n. s. 637, 1857; Haines v. Dubois, 30 N. J. L. 259. 1863.

sign, he is to be deemed an indorser.[26] In all cases the transaction is not completed until delivery of the instrument.[27]

Indorsement Must be by the Legal Holder.[28] Upon principle, no one but a payee or a subsequent holder can be an indorser. It often happens, however, that a stranger to the instrument places his name on its back. How shall he be regarded? Is he an indorser? Or a guarantor? Or a joint maker? This has proved to be a very difficult subject to settle in the law of bills and notes. Had the courts inquired as to the intention of the parties and the custom among merchants this difficulty could have been avoided. In Boynton v. Pierce, 79 Ill. 145, 1875, it was held that the presumption was, in the absence of explanatory evidence, that the defendant (who was not the payee of the note, but a third party) wrote his name on the back of the note at the time it was made, as guarantor. The objection to this view is that under the Statute of Frauds a guaranty, that is, an agreement to be bound for the debt of another, must be in writing. Further, under the law merchant a guaranty is not negotiable. As Ames says in his learned note to this case:

"The erroneous assumption that a prior indorser can never sue a subsequent indorser and that a blank signature is of itself a written contract, together with the misapplication of the presumption that every one knows the law, and the introduction of arbitrary and conflicting presumptions as to the intention of the parties, have produced almost endless litigation and a chaos of decisions upon a question which ought to have occasioned but little or no controversy."[29]

Anomalous Indorser. In Union Bk. v. Willis, 8 Metc. 504, 1844, the court said that if the question were a new one

[26] N. I. L. § 36, subdiv. 6.

[27] N. I. L. §§ 35, 36.

[28] See Bigelow p. 84.

[29] See 1 Ames Cases on Bills and Notes, 269, note, for a learned analysis of discordant decisions on this subject.

it might be held that the signature of a stranger to the note on its back did not bind him to anything, or he might be treated by third parties as a second indorser. But in view of the reported American cases the defendant who had written his name on the back of the note without being in any other way connected with the instrument, was held to be a joint maker. In England it would seem from the decision in Lecaan v. Kirkman, 6 Jurist (N. S.) 17, 1859, such anomalous indorser, as he is called, would not be liable in any capacity. Ames says that however deplorable this result, it is less open to criticism than the American decisions. The right result was reached, at last, in Hall v. Newcomb, 7 Hill (N. Y.) 416, 1844; and Moore v. Cross, 19 N. Y. 227, 1859.

The anomalous indorser of a bill should be on the same footing as the same indorser on a note. It has been held, however, that he is liable as a drawer but not as an indorser.[80] The confusion on this subject seems inexplicable. Had the courts inquired into the intention of the parties and the custom of merchants, instead of wasting their time on imaginary presumptions, they would have found that when a merchant writes his name on the back of a note or bill and whether he is named as a payee or not, he does so as an indorser. A merchant would say that writing your name on the back of a negotiable instrument means that you indorse it and become liable as an indorser.

One great merit of the N. I. L. is that it has set this question at rest in the forty states and territories where this law is now in force by adopting this correct view. N. I. L. § 113 reads:

"A person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates, by appropriate words, his intention to be bound in some other capacity."

The first case that arose under this section was that of

[80] Penny v. Innes, 1 C. M. & R. 439, 1864.

McLean v. Bryer, 24 R. I. 600, 1903. Two notes were in suit, both with the anomalous, irregular indorsement of Mrs. Bryer. As to the first note, made before the N. I. L. was adopted in Rhode Island, it was held, following previous decisions, that she was a joint maker. As to the second note, made after the adoption of the N. I. L., it was held that she was an indorser, and was, therefore, entitled to notice of dishonor.

Notwithstanding the apparent clearness of the rule adopted, there have been twenty-five cases already under this section of the N. I. L., the last being Hoyland v. Nat. Bk. of Middleborough, 126 S. W. 356 (Ky.), 1910.

Indorsement Completed by Delivery. We have learned already that a bill is operative against the drawer only upon its delivery to the payee. In the same way an indorsement takes effect only from the time of its delivery to the indorsee. In Brind v. Hampshire, 1 M. & W. 365, 1836, a bill of exchange was drawn in Honduras upon an English house and was sent to the drawer's agent in England who procured its acceptance and wrote to the payee in England about delivering it to him. Before delivery he received an order from the drawer in Honduras not to deliver the draft until after an investigation and settlement of an account of the drawer with the payee. Upon suit by the drawee it was held there had been no delivery of the bill and, therefore, no suit could be brought upon it or for it. See also, Marston v. Allen, 8 M. & W. 494, 1841, where Alderson, B. states correctly that to make a valid transfer there must be a delivery to some one who receives the bill *bona fide* and for value, and who is either himself the holder, or a person through whom the holder claims.

Essentials of Indorsement. An indorsement consists of two things: (1) the writing on the note of the name of the party transferring it; and (2) of a delivery for the purpose of completing the transfer. Accordingly, where a man wrote his name on a note but did not deliver it, and died, whereupon his executor delivered the note, it was held that

these acts did not constitute an indorsement and the person to whom the note was so delivered could not sue upon it.[31]

Delivery is made essential to the negotiation of a bill or note under the N. I. L. § 60. But when the holder of an instrument payable to his order, transfers it for value without indorsement, the transfer vests in the transferee, the transferror's title thereto, with the right to have the indorsement of the transferror under N. I. L. § 79.[32] In Viets v. Silver, 106 N. W. 35 (N. Dak.), 1905, the court held correctly that delivery is essential before a note becomes valid between the parties citing Daniel on Negotiable Instruments (N. I. L. § 63) instead of citing the N. I. L. then in force in that State. We shall find, in examining cases decided in States that have adopted this law, the counsel on both sides as well as the court, overlook or ignore its existence in many instances to an extent that it is difficult to account for and that should not be allowed to continue.

The case of Sublett v. Brewington, 122 S. W. 1150, 1909, was decided, we will not say whether correctly or incorrectly, but will leave the student to determine.

Effect of Indorsement. Instead of holding a bill until maturity and then collecting or receiving the amount it stands for, the payee, (or anyone to whom he sells it) may wish to transfer or sell it. In that case he writes and signs an order on the back directing its payment to his transferee, that is, he indorses it "Pay to ..... or order," or "Pay to the order of," or "Pay to bearer," or he may write "Pay *A*," for once negotiable, an instrument remains negotiable, unless restrictively indorsed or discharged by payment or otherwise, under the law merchant, and under § 77 of the N. I. L.[33] Under the custom of merchants such an indorser incurs the same liability as the drawee; he does two things, therefore, by his indorsement:

[31] Bromage v. Lloyd, 1 Ex. R. 32, 1847.

[32] Swenson v. Stoltz, 78 Pac. 999 (Wash.), 1904.

[33] For the meaning of restrictive indorsement, see N. I. L. § 66; and Oakdale Mfg. Co. v. Clarke, 29 R. I. 192, 1908.

(1) he transfers his interest in the bill; (2) he pledges his credit that the bill will be honored and that if not honored, he will honor it himself (by paying it). An indorsement is, therefore, both a transfer and a contract, under the law merchant.

Indorsement without Recourse. He may, however, stipulate against doing more than transferring title to the instrument, by indorsing it. This is done by adding, above his name, the words "without recourse" or words of like meaning. In N. I. L. § 68, this is called a qualified indorsement. Such an indorsement does not impair the negotiable quality of the instrument. Even the addition of words that constitute an assignment of a chose in action at common law may be looked upon as mere surplusage when made part of the indorsement of a negotiable instrument as in Thorpe v. Mindeman, 101 N. W. 422, 1904, "For value received I hereby sell, transfer, and assign the within note and the coupons thereto attached without recourse."

It is the better opinion that in a collateral agreement an indorsement shall operate only as a transfer of title, and will have the same effect as writing "without recourse" on the back of the instrument, when the question arises between the immediate parties.[34] In 2 Ames, Cases on Bills and Notes, note to this case, p. 135, may be found many cases on either side of this question. Of course if the instrument has passed into the hands of a third person, for value and without notice of an agreement that an indorsement on the instrument was made only to transfer the title he may hold the indorser liable for payment of the instrument.

There are some exceptional cases in which an indorsement operates only to transfer the title, as, for instance, when a person under full age has title to a bill and transfers his title by indorsement, he cannot be sued as acceptor.[35]

A corporation may transfer its title to a negotiable instrument by such indorsement, even though it may be

[34] Pike v. Street, M. & M. 226, 1828.

[35] Williamson v. Watts, 1 Camp. 552, 1808.

illegal for it to become liable thereon, by indorsing it. That is to say, in such a case its indorsement transfers the title only.[36]

§ 36. Kinds of Indorsement. N. I. L., § 63, states that an indorsement may be special, or in blank, and it may also be either restrictive, qualified, or conditional.

Special. A special indorsement specifies the person to whom or to whose order the instrument is to be payable and this indorsee's indorsement is necessary to further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed, is payable to bearer and may be negotiated by delivery.[37]

Restrictive Indorsement. N. I. L. § 66 defines what a restrictive indorsement is, but no case has yet arisen under this section. The most common instance of a restrictive indorsement is the familiar indorsement "for collection", or "for collection only", made by a bank upon checks deposited by customers who are to be credited with the amount when collected. Such an indorsement only makes the indorsee an agent to present the check or instrument and to receive payment for the account of the depositor, without transferring the title to the bank making the collection. The American cases on this subject will be found on p. 52 of the 3rd edition of Crawford's, Am. N. I. L.

Qualified. An indorsement "without recourse" is a qualified indorsement, constituting the indorser an assignor of the title to the instrument (as we have seen), and a guarantor of the genuineness of the signatures of prior indorsers and of their legal capacity to sign such an indorsement does not impair the negotiable character of the instrument.[38] In Elgin City Banking Co. v. Hall, 108 S. W. 1068 (Tenn.), 1907, it was held that an indorsement of a note without recourse is not sufficient, under this section, to put the purchaser on notice. This case well merits study.

[36] Halifax v. Lyle, 3 Ex. 4446, 1849. See also N. I. L. § 41 and Oppenheim v. Regal Cigar Co., 90 N. Y. Supp. 355, 1904.

[37] See N. I. L. § 64.

[38] N. I. L. § 68.

Conditional. In Smith v. Bradley, 112 N. W. 1062 (N. Dak.), 1907, an indorsement "By agreement with recourse after all security has been exhausted, waiving protest, E. R. Bradley" was held to be a conditional indorsement, obligating Bradley to pay only such balance as might be due after the security given was exhausted, and that no cause of action accrues against such an indorser until that is done.[39]

§ 37. Indorsement to Cashier Is Indorsement to Bank, Etc. If an instrument is made payable to the order of the cashier, treasurer, or fiscal officer of a bank or corporation, by the custom of merchants it is presumptively made payable to the order of the bank or corporation and not to the person who for the time being happens to be cashier or treasurer.[40] In Griffin v. Erskine, 109 N. W. 13 (Iowa), 1906, it was held that where a debtor transmitted a draft to the president of a bank made to the order of "Frank La Rue, Pt." and it was shown that "Pt." stood for "President"; that Frank La Rue was President; for years had received all the mail of the bank, and had indorsed all its drafts, etc:; it was held that the presumption that the draft was payable to the bank held good and, therefore, that the draft was for the bank.[41]

[39] See also N. I. L. § 69.

[40] The First Nat. Bk. of Angelica v. Hall, 44 N. Y. 395, 1871; N. I. L. § 72.

[41] See also Johnson v. Buffalo Center St. Bk. 112 N. W. 165 (Iowa), 1907; and First Nat. Bk. of Pomeroy v. McCullough, 93 Pac. 366 (Ore.), 1908.

CHAPTER V

THE LAW MERCHANT AND NEGOTIABILITY

§ 38. The Custom of Merchants. The custom of merchants meant their custom with regard to such subjects as were especially within the province of the business of merchants, that is, bills and notes. Therefore, formerly no one but a merchant could draw a bill of exchange. We have already learned that this was at first restricted to foreign or outland bills and was later extended so as to include inland bills. And as the custom of merchants applied to merchants only, no one but a merchant could draw a bill of exchange, just as for a long time only a merchant could go through bankruptcy. It may have been this unwillingness to acknowledge and give effect to the custom among merchants that led to denial of negotiability to a bill or note that was made payable to J. S., or bearer.[1] In the case of Butler v. Crips, 2 Mod. 29, 1704, Lord Holt held that only bills were negotiable, and, therefore, while it was conceded that an indorsed note was a bill of exchange as between the indorser and subsequent parties, it was further held that the indorsee could acquire no title as against the maker. These decisions were so manifestly not in accordance with the custom of merchants that the great dissatisfaction they aroused led to the passage of the statute 3 and 4 Anne, Ch. IX., 1705, which is so important in the history of our subject that § § 1, 2, and 3 are here copied for the student's special study.

§ 39. Statutes 3 & 4 Anne, Ch. IX. (1) "WHEREAS, it hath been held that notes in writing signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsable over,

[1] Hodges v. Steward, 1 Salk. 125, 1691; Nicholson v. Sedgwick, 1 Lord Raym. 180, 1697.

within the custom of merchants, to any other person; and that such person to whom the sum of money mentioned, in such note, is payable cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed, or made payable could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same. Therefore, to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner, be it enacted by the Queen's most excellent majesty by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all notes in writing, after the first day of May in the year of our Lord one thousand seven hundred and five, shall be made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually entrusted by him or them, to sign such promissory notes for him, her, or them, whereby such person or persons, body politic and corporate, his, her, or their servant or agent, as aforesaid, doth or shall promise to pay to any other person or persons, body politic or corporate, his, her, or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be by virtue thereof due and payable to any such person or persons, body politic and corporate, to whom the same is made payable; and also every such note payable to any person or persons, body politic and corporate, his, her, or their order, shall be assignable or indorsable over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants; and that the person or persons, body politic and corporate, to whom such money is or shall be, by such note made payable, shall and may maintain an action for the same in such manner as he, she, or they might do upon an inland bill of exchange, made or drawn according to the custom of merchants, against the person or persons, body politic and corporate, who, or whose servant or agent, as aforesaid, signed the same; and that any person or persons, body politic and corporate, to whom such note that is payable to any person or persons, body politic and corporate, his, her, or their order, is indorsed

or assigned, or the money therein mentioned ordered to be paid by indorsement thereon, shall and may maintain his, her, or their action for such sum of money, either against the person or persons, body politic and corporate, who, or whose servant or agent, as aforesaid, signed such note, or against any of the persons that indorsed the same, in like manner as in cases of inland bills of exchange; and in every such action the plaintiff or plaintiffs shall recover his, her, or their damages and costs of suit; and if such plaintiff or plaintiffs shall be nonsuited, or a verdict be given against him, her, or them, the defendant or defendants shall recover his, her, or their costs against the plaintiff or plaintiffs; and every such plaintiff or plaintiffs; defendant or defendants, respectively recovering, may sue out execution for such damages and costs by *capias, fieri facias* or *elegit.*

(2 And be it further enacted by the authority aforesaid: That all and every such actions shall be commenced, sued, and brought within such time as is appointed for commencing or suing actions upon the case by the statute made in the one and twentieth year of the reign of King James the First, instituted, 'An act for limitation of actions and for avoiding suits at law.'

(3) Provided, That no body politic or corporate shall have power, by virtue of this act, to issue or give out any notes, by themselves or their servants, other than such as they might have issued, if this act had never been made."

This act was made perpetual by the statute of Anne, ch. XXV., 1708 the original act having been passed to be in force three years only.

§ 40. **Triumph of Law Merchant.** The adoption of this law marks an important victory of the law merchant over the views of judges and lawyers, who insisted upon following the common law in a matter that was beyond its scope. There had been prior decisions, however, that in such cases the custom of merchants should prevail. It is sometimes said that the statute of Anne is but declaratory of the common law. This, however, would seem to be but an apology by judges who were brought up to think that the common law of England is the perfection of reason, in their efforts

to make out a good case for their system by denying that the law merchant imposed a new rule upon the common law. The decision written by Cockburn, C. J., in the interesting case of Goodwin v. Roberts, L. R. 10 Ex. 337, 1875, treats learnedly of the history of this phase of our law.

It is often said that Hodges v. Steward, and Nicholson v. Sedgwick were overruled in Grant v. Vaughan, 3 Burrow, 1516, 1764, but several objections to this view present themselves. The statute of Anne was passed in 1705 and Grant v. Vaughan was decided in 1764. Did it take fifty-nine years for the courts to cease to follow the erroneous views of Lord Holt? The language of the statute was so clear that it would seem the change became apparent at once. The truth is, those erroneous cases were overruled immediately by the statute. And lastly Grant v. Vaughan is an unsatisfactory case, and is imperfectly reported. Sooner or later those students who are to become lawyers will learn that headnotes are not always to be relied upon, and here is a case in point. The headnote is "Bearer of bill of exchange may maintain an action against the drawer." The case itself was stated as follows:

"The defendant Vaughan, a merchant in London, gave a cash note upon his banker, to one Bicknell, a husband of a ship of his, which note was dated 'London, 22nd October, 1763', and direction to Sir Charles Asgill, who was Vaughan's banker; and was worded thus—'Pay to Ship Fortune or bearer' so much. Bicknell by some accident lost this note. The person who found it, or who at least was in possession of it (however he might obtain that possession), came, four days after the note was payable in London, to the shop of Grant, the plaintiff, who was a tradesman at Portsmouth, and bought five pounds' worth of tea of him, and gave him this note in payment, desiring to have the change out of it. Grant (the plaintiff) stept out to make inquiry 'who this Vaughan might be.' And upon being informed 'That he was a very good man, and that it was his handwriting' he readily gave the change out of the note, retaining the price of the tea. Vaughan, upon being apprised that Bicknell had lost the note, sent notice to Sir Charles Asgill, 'Not to pay it'. Whereupon

Grant, being refused payment, brought his action upon the case against Vaughan, and inserted two counts in his declaration: one, upon an inland bill of exchange; the other an *indebitatus assumpsit* for money had and received to his use. The cause was tried by a special jury of merchants, who found for the defendant."

This verdict was set aside by the court, Wilmot J. writing the opinion, which well merits consideration. Several questions suggest themselves, which we leave for the student to answer.

(1) Was this instrument a bill of exchange or a check?[2]

(2) As mention is made of "four days after the note was payable in London," had it been accepted?

(3) Or was it a note?

(4) As it was overdue after Grant took it, was he an innocent purchaser for value?

Instrument Payable to Fictitious Person. If an instrument is made payable to the order of a fictitious person or an inanimate object it is payable to bearer.[3] In Willets v. Phoenix Bank, 2 Duer 121, 1853, one check was payable to the order of 1658, and three other checks were made payable to the order of bills payable. In Mechanics Bank v. Straiton, 3 Keyes (N. Y.) 365, 1867, the checks were made to bills payable or order. It was decided in Seaboard Nat. Bank v. Bank of America, 100 N. Y. Supp. 740, 1906, under this section, that where a draft is drawn to the order of an existing firm which did not know of the issuance of the draft, it was not drawn to the order of a fictitious or nonexisting payee, unless the drawer had no actual knowledge of the existence of such firm and his intent was to make it payable to bearer.[4]

Negotiability Imported by Word Assignees. We have learned that to be negotiable, an instrument must be pay-

[2] N. I. L. § 321.

[3] N. I. L. § 28.

[4] See also Snyder v. Corn Ex. Nat. Bk., 70 At. 876 (Pa.), 1908; and Trust Co. of America v. Hamilton Bk. 112 N. Y. Supp. 84, 1908.

able to order or to bearer.[5] There is an apparent exception to this rule in the case of municipal bonds that are payable to *A* or to assignees. They were held to be negotiable in Porter v. City of Janesville, 3 Fed. Rep. 617 (Wis.), 1880, upon the ground that negotiability may be imported by using words evincing that intent, besides the words "order" or "bearer".[6]

Indorsement and Delivery. We have seen that the title to a bill payable to order cannot pass by mere delivery and that the name of the one to whom it is payable must further be written on the instrument.[7] Nevertheless, a delivery without indorsement passes the title to a prior holder who takes up a bill. The case, Death v. Serwonters, Nelson's Letch. 272, 1685, illustrates the difference between the *purchaser* and the *payment* of a bill. The same is true in the case of a stranger to the instrument who takes it up for honor.[8]

Title without Indorsement or Delivery. In some cases the title to an instrument may pass without either indorsement or delivery. Thus, in Stone v. Rawlinson, Willes 559, 1745, it was held that upon the death of the holder of a bill, the title thereto, as in the case of other chattels, vests in his executor or administrator, by operation of law.

Upon the same principle the title to an instrument held by a bankrupt passes to his assignee in bankruptcy,[9] unless the instrument was only for the accommodation of the bankrupt.[10]

This is probably changed now by § 55 of the N. I. L. The title to an instrument held by a *feme sole* (a single woman) at common law, vested, by her marriage, in her

[5] N. I. L. § 20.

[6] See also the dictum by Porter J. in Raymond v. Middleton, 29 Pa. 529, 1858.

[7] See N. I. L. § 60 and the cases already cited.

[8] Mertens v. Wilmington, (Esp. 113, 1794); Konig v. Bayard, 1 Peters 250, 1828.

[9] Smith v. DeWitts, 6. D. & R. 120, 1825.

[10] Wallace v. Hardacre, 1 Camp. 45, 1807.

husband.[11] This can only be supported upon the ground that a negotiable instrument is a chattel personal and not a chose in action.[12] The inability of married women to hold their own property is now done away with in most of our States.

But delivery of an instrument without indorsement passes the beneficial interest therein, and a subsequent indorsement of the transferror perfects the title, even though he may have become bankrupt.[13] So also where a woman delivers a promissory note payable to her order without indorsing it, and afterwards marries the maker and indorses the note, her indorsement transfers the legal title.[14] In the event of the death of one who delivered a note, unindorsed, but which was afterwards indorsed by his legal representative, the legal title passes thereby.[15]

Indorsement May be Compelled by Equity. If by mistake, accident, or fraud, the indorsement of a bill has been omitted upon its transfer, when the intention was to indorse it, a court of equity will compel the indorsement to be made. But the transferee of the bill was not thereby authorized without more, to indorse on the note the name of the transferror.[16] In other words, the note was only *assigned,* in this instance, and the transferee had only the same rights he would acquire upon the assignment of a non-negotiable bill. In Grimes v. Piersol, 25 Ind. 245, 1865, it was held that where a promissory note is indorsed to a person named in the note, the transferee or his vendee, cannot, without the consent of the transferror, strike out the name of the indorsee in the instrument, and insert in its place the name of the vendee, and thereby enable him to sustain a suit against the transferror, as upon a transfer or assignment to himself. The indorsement is the

[11] M'Neilage v. Holloway, 1 B. & A. 218, 1818.
[12] See the learned note on this case, 2 Ames Cases on Bills and Notes, 697.
[13] Smith v. Pickering, Peake 50, 1791.
[14] Guptill v. Horne, 63 Me. 405, 1874.
[15] Watkins v. Maule, 2 Jacobs & Walker 237, 1820.
[16] Harrop v. Fisher, 9 Weekly Rep. 667, 1861.

written contract of the indorser, and cannot be altered without his consent.

A delivery of a negotiable instrument without the necessary indorsement to complete the title, is but the assignment of an equitable interest. Therefore, even a purchaser for value without notice acquires no greater interest in the instrument than his assignor had.[17] This well illustrates the difference between *assignment* and *indorsement.*

Conflict of Laws. The validity of every negotiable instrument, acceptance or indorsement, depends as in every case of contract, upon the *lex loci contractus* (the law of the place of the contract).[18] So the nature of the obligation, that is, whether it is a negotiable instrument, or a contract, whether assignable or non-assignable, is likewise determined by the same *lex loci contractus.*[19] In the latter case, although, under the law peculiar at that time to Missouri, a note was not negotiable in that state unless on its face expressed to be "for value received"; it was held that a note made in another State, there executed, and to be paid where the words "for value received" are not necessary to negotiability, may be sued upon in Missouri, because they are to be governed by the law of the place where made.

§ 41. Transfer by Whom Made. Only he who has the title to a negotiable instrument can transfer it. The exception to this rule in the case of a purchaser for value without notice of antecedent fraud will be considered next. If the instrument is held by several jointly, all must transfer. In Carvick v. Vickery, 2 Douglas 653, note, 1783, the bill to the order of *A* and *B* was indorsed by *B.*

An eminent banker was called as a witness to give evi-

[17] Edge v. Bumford, 31 L. J. R. 805, 1862.

[18] See 2 Ames Cases on Bills and Notes 255, note 1; and Bennison v. Jervison, 12 Jurist 485, 1848.

[19] Ory v. Winter, 4 Martin, N. S. 277 (La.), 1826; De La Chaumette v. Bank of England, 2 B. & A. 385, 1831; Robertson v. Burdekin, 1 Ross L. C. *812, 1843; Woods v. Ridley, 11 Humphr. 194 (Tenn.), 1850; Stix. v. Mathews, 63 Mo. 371, 1876.

dence to the jury that according to the custom of merchants the indorsement must be by all of those to whose order the bill was made payable. The jury with one voice declared this to be the custom and found a verdict for the defendant. In Estabrook v. Smith, 6 Gray 570 (Mass.), 1856, it was held that a note payable to *A* and *B* (a partnership) must be indorsed by both to *B* to convey the title, and that an indorsement by *A* alone to *B* is not enough. The same is true in the case of a note held by executors except in the case of a note payable to the order of the testator, in which case the indorsement of any one of several executors will be enough.[20]

§ 42. Transfer and the Right to Indorsement. N. I. L. § 79 provides that where the holder of an instrument payable to his order, transfers it for value without indorsing it, the transfer vests in the transferee, such title as the transferror had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferror, etc. In Swenson v. Stolz, 78 Pac. 999 (Wash.), 1904, an action was brought by the indorser of a note who delivered it to the plaintiffs without indorsing it, orally guaranteeing to them that the note was good and would be paid by the makers when due. Upon its dishonor the holders sued Stolz. It is left for the student to determine whether the decision against Stolz was right or wrong. In Mayers v. McRimmon, 53 S. E. 447 (N. C.), 1906, it was held that a delivery of negotiable instruments without indorsement constituted the plaintiff but the equitable owner, and they were, therefore, subject to any valid defense open against the drawer. Incidentally, it was held in this case that the placing of the name of the payee of a draft on the back thereof, with a rubber stamp, by a person having authority so to do, and with the intent to indorse the instrument, constitutes a valid indorsement. Meuer v. Phoenix Nat. Bk., 88 N. Y. Supp. 83, 1904, is another case arising under N. I. L. § 79. In Marling v. Fitzgerald, 120 N. W. 388 (Wis.), 1909, the provisions of the N. I. L. were held

[20] Johnson v. Mangum, 65 N. C. 146, 1871.

to be subordinate "to the supreme rule of estoppel *in pais*," whether correctly or not the student can decide after studying that branch of the law.

§ 43. Purchaser for Value Without Notice. We have already pointed out the usual rule of law with regard to title to personal property generally. If the holder or possessor has no title, no ownership, he can convey none to a purchaser. An exception exists in the case of the current coin, or national, or bank notes of a country, used and passed as money. Another exception is, by the custom of merchants, in the use of negotiable instruments, transferable by delivery. That is to say, these instruments have been placed, in this respect, upon the same footing as money.

Therefore, one who purchases such instruments for value, in good faith, and without notice of any antecedent fraud or defect in the title, from one having them in his possession, acquires a good title thereto, irrespective of the title of his vendor.[21] This is true of a bill, even before acceptance.[22] And if one pledges such instruments for advances upon them, that is, for money loaned upon them as collateral security, his pledgee gets good title to them, as a purchaser, within this rule.[23] But a pledgee of ordinary chattels under these circumstances, does not acquire the legal title to the pledge.[24] So the transfer by a bankrupt of instruments, the legal title to which generally passes by delivery, will give no title to his immediate transferee (because, as we have already seen, upon bankruptcy, the title thereto, by operation of law has passed to the assignee in bankruptcy). Nevertheless, the transferee of the bankrupt, upon delivery of such instruments to another person for value and without notice of his want of title, places such a second transferee in the position of one who takes money from a thief, giving value therefor and having no knowledge of the theft.

[21] Miller v. Race, 1 Burr. 452, 1758; Grant v. Vaughan, 3 Burr. 1516, 1764.
[22] Peacock v. Rhodes, 2 Douglas 633, 1781.
[23] Collins v. Martin, 1 B. & P. 648, 1797.
[24] See Note 1, p. 324, 1 Ames' Cases on Bills and Notes.

He has become that favorite of the law—the third party, an innocent purchaser for value without notice.

But how is it in the case of instruments that are negotiable only by indorsment?

We have already learned that the title to instruments that are negotiable by indorsement cannot be transferred except by the indorsement of the legal holder. Therefore, even a purchaser for value without notice acquires no title if the indorsement be forged.[25] Even an indorsement by another man of the same name is a forgery, in this respect.[26]

Implied Authority of Partner to Make Negotiable Instruments. This proceeds upon the principle that the signature by a member of a firm is the act of an agent acting within the scope of his general authority. Hence it is effectual as a contract and also as a transter when in favor of a purchaser for value without notice.[27]

§ 44. Negligence as Affecting Liability. The question often arises whether an instrument in the hands of a purchaser for value without notice, is valid, as against a defendant who was induced through fraud or misrepresentation, to become a party to the instrument. The answer depends upon the question whether or not the defendant acted negligently. If he did, he is, and whether he acted negligently is for the jury to decide, upon the peculiar facts in each case. In the following cases he was held not to have acted negligently and, therefore, was not bound even though the instrument had passed into the hands of a third person who had paid value for it, without notice of the fraud: Whitney v. Snyder, 2 Lans. (N. Y.) 477, 1870; Gibbs v. Linaburg, 22 Mich. 479, 1871; Walker v. Ebert, 29 Wis. 194, 1871; Detwiler v. Bish, 44 Ind. 70, 1873; Briggs v. Ewart, 51 Mo. 245, 1873; Martin v. Snyder, 55 Mo. 245, 1873; Fenton v. Robinson, 4 Hun. (N. Y.) 252, 1875; Anderson v. Walter, 34 Mich. 113, 1876. In the following

[25] Smith v. Chester, 1 T. R. 654, 1787.

[26] Mead v. Young, 4 T. R. 28, 1790; see also Allport v. Meek, 4 C. & P. 267, 1830.

[27] See the very full and learned note on this subject in 2 Ames, Cases on Bills and Notes, 557.

cases the defendants were held liable to innocent holders for value, because of the negligence when they put their names on the instruments: McDonald v. Muscatine Bank, 27 Iowa, 319, 1869; Douglas v. Matting, 29 Iowa 498, 1870; Leach v. Niles, 55 Ill. 273, 1870; Mead v. Munson, 60 Ill. 49, 1871; Abbott v. Rose, 62 Me. 194, 1873; Chapman v. Rose, 56 N. Y. 137, 1874; Homer v. Hale, 71 Ill. 552, 1874; Swannell v. Watson, 71 Ill. 456, 1874; Nebeker v. Cutsinger, 48 Ind. 436, 1874; Glenn v. Porter, 49 Ind. 500, 1875; Shirts v. Overjohn, 60 Mo. 305 (overruling Corby v. Weddle, 57 Mo. 452, 1874); Frederick v. Clemens, 60 Mo. 313, 1875; Citizens Bk. v. Smith, 55 N. H. 593, 1875.

If one puts his name to an incomplete instrument or writes his name on a piece of paper, above which signature a promissory note is fraudulently written, and the incomplete instrument, made complete through fraud, without negligence on the part of the one who has his name thus written, passes into the hands of even an innocent holder for value without notice, he cannot be held liable.[28]

The title of an innocent purchaser for value cannot be impeached because of illegality in the transaction between the parties to an instrument, except where by law the instrument is absolutely void. Potter v. Tubb, 1 Chitty Jr. 430, 1875, and in the note to this case in 1 Ames, Cases on Bills and Notes, 464, may be found numerous cases, English and American, in which even the innocent purchaser for value without notice could not recover, because of a statute expressly making the instrument void. These cases are classified under "Bill or note executed on Sunday"; "Bill or note given for Intoxicating Liquor"; and "Other Instances of Illegality". Other cases are given in note 2, p. 416, of the same volume.

§ 45. Rights of Holder in Due Course. N. I. L. § 96 provides that a holder in due course holds the instrument free from any defect of title of prior parties and free from defenses available to prior parties among themselves and

[28] See the leading English case of Boxendale v. Bennett, 3 Q. B. D. 525; Caulkins v. Whisler, 29 Iowa 495, 1870.

may enforce payment of the instrument for the full amount thereof against all parties liable thereon.

Twenty-four cases have already arisen under this provision, many of them full of interest and involving principles difficult of application. The first case was that of Greeser v. Sugarman, 37 Misc. (N. Y.) 799, 1902; in which the note sued upon had been stolen. In McNamara v. Jose, 28 Wash. 461, 1902, the plaintiff bought the note for $1,000 of the payee for $500, yet the court held that this fact lost much of its persuasiveness when it is remembered that the note was made payable at Cape Nome "which the court judicially knows is on the coast of Alaska, inaccessible for a greater portion of the year, and not at any time in the line of regular communication. It certainly would not be sought by investors in commercial paper so long as there was a possibility of their being compelled to enforce its payment at that place". But in Sutherland v. Mead, 80 App. Div. (N. Y.) 103, 1903, proceeding upon a superseded principle which is not in accord with the N. I. L. (as we shall see further on), it was held that the holder of a note under such circumstances can collect only the amount of the cash payment made by him therefor. In Nat. Bk. of Commerce v. Pick, 99 N. W. 63 (Wash.), 1904, it was held that a promissory note, void in the hands of the payee because it is a foreign corporation doing business in the State without having complied with the laws may, nevertheless, be enforced by a *bona fide* purchaser and indorsee before maturity, who had no notice of the facts rendering it void in the hands of the payee. In Mass. Nat. Bk. v. Show, 187 Mass. 160, 1905, it was held that under this section a holder in due course of a promissory note payable to bearer, can acquire a good title to the note from one who has stolen it.

Effect of Illegality of Consideration. One of the most important questions under this law is whether a holder in due course, N. I. L. § 91, may recover in a suit upon an instrument which is void as between the direct parties thereto, because given in violation of some statute, as, for instance, where the instrument is given for a gambling

debt or is tainted with usury, both forbidden by law. In Wirt v. Stubblefield, 17 App. Cas. (D. C.) 283, 1900, it was held that such a note is good in the hands of a *bona fide* purchaser for value without notice, under this section, notwithstanding the statutes 16 Car. 2, ch. 7; and IX Anne, ch. 14, in force in the District of Columbia. As it is well the student should know the high opinion of the N. I. L. held by this court, it is herewith cited:

"We know it is largely derived in its form and provisions, from the English Act upon the subject; and we know, moreover, that the great and leading object of the act, not only with Congress, but with the large number of the principal commercial States of the Union that have adopted it, has been to establish a uniform system of law to govern negotiable instruments wherever they might circulate or be negotiated. It was not only uniformity of rules and principles that was designed, but to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions and the effect of mere local laws and usages that have heretofore prevailed. The great object sought to be accomplished by the enactment of the statute was, to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere in it, to the prejudice and disappointment of innocent holders, as against all of the parties to the instrument professedly bound thereby. This clearly could not be effected so long as the instrument was rendered absolutely null and void by local statute, as against the original maker or acceptor; as is the case by the operation, indeed by the express provision of the statutes of Charles and Anne".

On the other hand, in Alexander v. Hazelrigg, 97 S. W. 353, (Ky.) 1906, the court, although citing the above case and quoting from it, decided exactly to the contrary, saying:

"It is inconceivable that the General Assembly, in the passage of the act of 1904, for the protection of innocent holders of negotiable instruments, intended to, or did repeal § 1955, Ky. Stat. 1903, which declares all gaming contracts void. In our opinion the disappointment of an innocent holder of a negotiable instrument would not be as

hurtful and injurious to the best interests of the State as the removal of the ban from gaming contracts".

In Lawson v. First Nat. Bk., 102 S. W. 324 (Ky.), 1907, in which the note in suit was a peddler's note, made void under a Kentucky statute, unless indorsed with the words "Peddler's note", which had not been done, the same doctrine was followed, the court saying:

"The negotiable instruments' statute is a most comprehensive piece of legislation. It goes into minutest details in dealing with the subjects embraced by it. The whole scope of it is shown to be dealing with commercial paper so as to protect innocent purchasers of such against mere defenses available as between the original parties. It gives such paper currency, free from original defenses. But it applies only to paper that might have been obligatory between the parties. But where the parties were never bound because the law made the note void, as contrary to the public policy as expressed in the statutes, the negotiable instruments' act does not apply and ought not to. The prevention of crime is of more importance than the fostering of commerce. The latter act should be read in view of its purposes, and not as intending to repeal other statutes passed in the exercise of the police power of the State to suppress crime and fraud".

In Schlesinger v. Lehmaier, 191 N. Y. 69, 1908, it was held that the provisions of the state banking law on the subject of usury are to be construed with N. I. L. § 96 and that a bank that had bought an instrument infected with usury, could not recover thereon, without holding that it became a holder in due course under N. I. L. § 91.

In Klar v. Kostiuk, 119 N. Y. Supp. 683, 1909, it was held that the defense of usury cannot be urged against a *bona fide* holder of a note under N. I. L. § 96, and an indorser cannot plead usury against the holder of a note in due course, under N. I. L. § 116.

As the draftsman of the N. I. L., John J. Crawford says (N. I. L., 3d ed., p. 74):

"The subject is one, perhaps, upon which the courts

will never agree; for they will construe the section with reference to the policy of their respective States".

In some States the requirements of commerce will be the controlling consideration; in others, the protection of the weak and ignorant. The modern view is admirably expressed in Chemical Nat. Bk. v. Kellogg, 183 N. Y. 92, 1905:

"The business of the country is done so largely by means of commercial paper that the interests of commerce require that a promissory note, fair on its face, should be as negotiable as a government bond. Every restriction upon the circulation of negotiable paper is an injury to the State, for it tends to derange the trade and hinder the transaction of business. Commercial necessity requires that only slight evidence should be insisted upon to establish an estoppel *in pais* as to the validity of commercial paper. The only practicable rule is to make the face of the paper itself, when free from suspicion, sufficient evidence, in the absence of notice, against all who aided to put it into circulation, in that condition, unless the note is void by the positive command of a statute, such as the act against usury. No other rule would work well, for it would be intolerable if every bank had to learn the true history of each piece of paper presented for discount before it could act in safety. It is better that there should be an occasional instance of hardship than to have doubt and distrust hamper a common method of making commercial exchanges. And it is plain that if a negotiable instrument is to be void in the hands of a holder in due course, because it was given for a usurious loan, or for a gambling debt, or to a "peddler", or for the price of a stallion, or for a lightning rod, it is not merely that instrument alone that is affected, but a doubt is cast upon all commercial paper originating in the community".[29]

Adequacy of Consideration. In Cromwell v. County of Sac., 96 U. S. 51 at 60, 1877, the Supreme Court of the United States was of opinion

"That a purchaser of a negotiable security before ma-

[29] See further Sullivan v. German Nat, Bk., 18 Co. App. 39, 1902 (certificate of deposit transferred for a gambling debt); Quiggle v. Herman, 131 Wis. 379, 1907 (note given for a stallion); Arnd v. Sjoblom, 131 Wis. 642, 1907 (note for lightning rods); Gordon v. Levine, 194 Mass. 418, 1907 (note made on Sunday).

turity, in cases where he is not personally chargeable with fraud, is entitled to recover its full amount against its maker, even though he may have paid less than its par value, whatever may have been its original infirmity. We are aware of numerous decisions in conflict with this view of the law; but we think the sounder rule, and the one in consonance with the common understanding and usage of commerce, is that the purchaser, at whatever price, takes the benefit of the entire obligation of the maker. Public securities and those of private corporations are constantly fluctuating in price in the market, one day being above par and the next below it, and often passing within short periods from one-half of their nominal to their full value. Indeed, all sales of such securities are made with reference to prices current in the market, and not with reference to their par value. It would introduce, therefore, inconceivable confusion if *bona fide* purchasers in the market were restricted in their claims upon such securities to the sums they had paid for them. This rule in no respect infringes upon the doctrine that one who makes a loan upon such paper, or takes it as collateral security for a precedent debt, may be limited in his recovery to the amount advanced or secured".[30]

Duress and Release. Even if an instrument be made under duress (meaning under threats or compulsion inducing action that would not otherwise be taken) it is valid in the hands of a purchaser for value acting in good faith and without knowledge of the duress, although it may cast upon such a purchaser, when he sues upon the instrument, the burden of proving that he is a *bona fide* holder for a valuable consideration.[31] This is in accordance with the decision of Lord Ellenborough in Duncan v. Scott, 1 Camp. 100, 1807. In Dod. v. Edwards, 2 C. & P. 602, 1827, Lord Brougham, of counsel for the plaintiff in an action against the indorsee of a bill, claimed that the drawer had put it out of his power to indorse the bill over to another, by giving a release of all claims against the defendant, the indorsee of the bill, before he made the indorsement. The court held, very properly, that to make the defense valid

[30] N. I. L. § 53.

[31] Clark v. Pease, 41 N. H. 414, 1860; Hogan v. Moore, 48 Ga. 156, 1873.

the defendant must show that the plaintiff was aware of the release when he took the bill, in other words, that he was not an innocent purchaser for value before maturity. If this were not so, it would put an end to the circulation of bills, for every one purchasing them would have to inquire into their validity, before buying them. So if a payee of an instrument sell it before maturity, although the instrument has been paid by the maker, the maker is still liable on the note in the hands of a *bona fide* purchaser for value, for the maker was negligent in not securing the delivery to himself of the instrument, or the cancellation of his name thereon when he paid it.[32]

Effect of Mistake in Date. Even if an instrument were incorrectly dated owing to a mistake (which became important, because upon it depended the question whether the suit was brought before the instrument was due, upon suit brought by a *bona fide* purchaser for value, who relied upon the date inserted in the instrument) the defense of error in the date is inadmissible.[33]

§ 46. Bona Fide Purchasers for Value. The rights of the holder of negotiable instruments and under what circumstances he is or is not a *bona fide* purchaser for value or a holder in due course are carefully defined in Art. V. of the N. I. L. for the subject is one that has called forth and will continue to call forth, a great amount of litigation. Under N. I. L. § 90 it was held in Owne v. Storms, 72 At. 441 (N. J.), 1909, that the payee or indorsee of a note who is in possession of it, though not the beneficial owner thereof, may sue thereon in his own name, by consent of the owner, and for that purpose, may strike out his own and subsequent indorsements. Under N. I. L. § 52, defining "A Holder in Due Course", some seventy cases have already arisen in the States that have adopted the N. I. L. but reference can be made now to only a few of these cases. The first case was that of McGroh's Sons Co. v. Schneider,

[32] White v. Kibling, 11 Johns. (N. Y.) 128, 1814; Palmer v. Marshall, 60 Ill. 289, 1871.

[33] Houston v. Young, 33 Me. 85, 1851.

34 Misc. (N. Y.) 95, 1901, in which it was held that the question whether the plaintiff was or was not a holder in due course, was a question for the jury to decide, upon the particular facts shown in evidence in the case.

In Boston Steel and Iron Co. v. Steuer, 66 N. E. 646 (Mass.) 1903, it was held that where the drawer of a check gives it to another to be delivered to a third party in payment of a debt of the drawer, but it is fraudulently named to the payee in payment of a debt due from the one having the check, and the payee accepted it in good faith in payment of such debt, the payee is a *bona fide* purchaser for value, and the drawer cannot set up the fraud in defense to the check, nor maintain an action for money had and received after payment thereof. In Packard v. Windholz, 40 Misc. (N. Y.) 347, 1903, the fact that the payee's indorsement of a note was forged, was held not to excuse one who subsequently indorsed the note for the accommodation of the maker, from liability to a subsequent indorsee and holder in due course, and a holder in due course of an instrument, who was not a party to an alteration made therein without the assent of all the parties liable thereon, may enforce payment according to the original tenor of the bill.[34] The court said in the case of Bk. of Ozark v. Hanks, *ut supra:*

"The law has shown its consideration for the honest purchaser of negotiable paper and has surrounded *bona fide* purchasers with every reasonable safeguard. The procuring of negotiable paper by fraudulent practices, as in the present case, has been carried on systematically by many swindling schemes. It is, of course, a part of the "game" to market their fraudulent paper, for without such an opportunity the scheme could not be carried into consummation. The legal maxim 'caveat emptor' (let the buyer beware) applies as well to purchasers of negotiable paper as to the purchasers of any other species of property".

[34] Albany Co. Bk. v. People's Co-Op. Ice Co., 92 App. 47, 1904; Milnes v. Kauffman, 93 N. Y. Supp. 669, 1905; Schlesinger v. Lehmaier, 99 N. Y. Supp. 389, 1906; Quiggle v. Herman, 111 N. W. 479 (Wis.), 1907; Mattock v. Scheurman, 93 Pac. 823 (Ore.), 1908; Iowa Nat. Bk. v. Carter, 123 N. W. (Iowa), 1909; Bk. of Ozark v. Hanks, 125 S. W. 221 (Mo.), 1910.

§ 47. When Instrument Is Overdue. N. I. L. § 92 provides that where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course. Two interesting cases relating to the same cause of action have arisen under this section. In Gordon v. Levine, 194 Mass. 418 or 80 N. E. 505, 1907, it was held that where the drawer, the drawee and the payee of a check are all in the same city or town, the check should be presented for payment before the close of banking hours on the day after its delivery, and its circulation from hand to hand by indorsement does not extend the time for its presentment. In another suit between the same parties, Gordon v. Levine, 83 N. E. 860, 1908, it was held that an instrument, void because delivered on Sunday, is valid in the hands of a *bona fide* purchaser for value without notice. This invalidity was because of a "Sunday law", for without such a law, although courts take judicial knowledge that by the law of the land the prevailing religion is the Christian religion, it does not follow that men may not enter into a contract with each other on Sunday. They may, unless there is a law forbidding it. Under N. I. L. § 94, several interesting cases have arisen among which are the following: Keene v Behan, 82 Pac. 884 (Wash.), 1905, holding that the title of a payee of a note is defective where the only consideration for the note is accrued interest on a loan previously made at a rate of interest forbidden by the law of the State. In Yakima Valley Bk. v. McCallister, 79 Pac. 1119 (Wash.), 1905, it was held that where the maker of a note payable to himself, is induced by a fraudulent trick, to indorse it, without knowledge on his part, of having indorsed it, and without having had any intentions to indorse it when such indorsement was obtained, is not liable thereon, even to a *bona fide* holder.[85]

[85] Aukland v. Arnold, 111 N. W. 212 (Wis.), 1907; Cox v. Cline, 117 N. W. 48 (Iowa), 1908; Packard v. Figlinolo, 114 N. Y. Supp. 753, 1909; Arnd. v. Aylesworth, 123 N. W. 1000 (Iowa), 1909; O'Connor v. Kleiman, 121 N. W. 1088 (Iowa), 1909; Schlesinger v. Lehmaier, 117 App. Div. 428 (N. Y.), 1907, reversed 989, 1906, which decision was affirmed in 191 N. Y. 69, 1908.

Notice of Defect. It is often very difficult to determine what constitutes notice of defect. N. I. L. § 95 provides that "the person to whom the instrument is negotiated, must have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith". This is but affirmation of existing law before the adoption of the N. I. L. and the student will find an excellent note in the third edition of Crawford's "Annotated Negotiable Instruments' Law", p. 68, with numerous cases cited.

Among the thirty or more cases that have arisen under this section since its adoption in the various States, the inquiring student will find that a knowledge of the following cases will be of great value: McNamara v. Jose, 28 Wash. 467, 1902; Packard v. Windholz, 40 Misc. (N. Y.) 347, 1903; Black v. First Nat. Bk. 54 At. 88 Md. 1903; Goetting v. Day, 87 N. Y. Supp. 510, 1904; Ford v. Brown, 88 S. W. 1036 (Tenn.), 1905; Johnson Co. Sgs. Bk. v. Walker, 79 Conn. 348, 1906; Wash v. City Trust Co., 102 N. Y. Supp. 50, 1907; Johnson Co. Sgs. Bk. v. Rapp, 91 Pac. 382 (Wash.), 1907 (a good case although the N. I. L. was not cited); Siegmeister v. Lispenard Realty Co., 107 N. Y. Supp. 158, 1907; *In re* Hopper-Morgan Co., 156 Fed. Rep. 525 (N. Y.), 1907 (another good case, in which again the N. I. L. was not referred to). It seems marvelous that in some cases in which the N. I. L. is ignored, although in force, a wealth of learning is shown in citing old cases decided years before the N. I. L. was drawn, while not one case is cited among the many in other States where the N. I. L. is also in force and which were decided under the very section of the N. I. L. decisive of the point in issue.[36] The student will notice that many of these cases cite not only N. I. L. § 95 but also other sections of Article V. This shows how closely interwoven the sections of this article

[36] U. S. Ex. Bk. v. Zimmerman, 113 N. Y. Supp. 33, 1908 (still another case in which the N. I. L. was not referred to; First State Bk. of Pleasant Dale v. Borchers, 120 N. W. 142 (Nebr.), 1909; Barbieri v. Casazza, 115 N. W. Supp. 1074, 1909; Reeves v. Letts, 128 S. W. 246 (Kans.), 1910.

are, and that the whole chapter must be thoroughly studied to master the difficult subject of the rights of a holder of negotiable instruments and when he is a holder in due course. In this connection the attention of the student is particularly called to the effect of N. I. L. § 35, for in consequence thereof one who has signed an instrument which is complete on its face, is liable thereon to a holder in due course, although it was never delivered by him, but lost by him, or he may recover even from someone else after his death. In his criticism of the N. I. L., Dean Ames of the Harvard Law School,[37] says that this result is somewhat startling at first, but should commend itself on reflection, and that after much consideration, it has been adopted in Germany. It is but another step in the continuous development of the principle that negotiable instruments are to be made as negotiable as coin. Ten cases have already arisen under this section and it will be found to be profitable to study them. The first case is that of Greeser v. Sugarman, 37 Misc. (N. Y.) 799, 1902, which has already been cited. See further, Moak v. Stevens, 91 N. Y. Supp. 903, 1904, in which after the death of the maker of a check, the payee, who acted as nurse and physician to the deceased, presented it for payment. The check had been in possession of the payee a week after its date. There was evidence that the check was filled in, except the signature, in the handwriting of the payee; that the maker was in the habit of having unfilled printed checks signed in blank, about him, and that the payee had stated, soon after the death of the maker, that the maker had never given him anything except his salary. It was held that the evidence was not enough to overcome the presumption of a valid delivery and of the existence of a sufficient consideration under N. I. L. §§ 35 and 50.[38]

[37] See Brannan, The N. I. L. p. 43.

[38] See further Mass. Nat. Bk. v. Snow, 187 Mass. 159, 1905; Hodge v. Smith, 110 N. W. 192, 1907; Colburn v. Arbecam, 104 N. Y. Supp. 986, 1907; Stouffer v. Curtis, 85 N. E. 180 (Mass.), 1908; Buzzell v. Tobin, 86 N. E. 923 (Mass), 1909; Paulson v. Boyd, 118 N. W. 841 (Wis.), 1908;

Carelessness of Maker. If one issues a negotiable instrument so carelessly or negligently made up that the amount may be "raised", either by adding to the figures or the written amount, he will be held liable for the loss that may result therefrom, to an innocent holder for value or if paid by the drawee.

This is upon the principle enunciated by Cleasby, B. in Halifax Union v. Wheelwright, L. R. 10 Ex. 183, at 192, 1875. It is perhaps only an application of one of those general principles which do not belong to the municipal law of any particular country, but which we cannot help giving effect to in the administration of justice, viz, that a man cannot take advantage of his own wrong, he cannot complain of the consequence of his own default against a person who was misled by that default without any fault of his own, citing the leading case of Young v. Grote, 4 Bing, 253, 1827. In Belknap v. Nat. Bk. of N. America, 100 Mass. 376, 1868, a merchant sent by his clerk, to the post office, to be mailed, a sealed letter containing a check drawn by himself payable to A. B. or order. The clerk abstracted this check from the letter, altered it by forging the words "or bearer" after "A B" and before "or order" and striking out the latter words. He then passed it to a holder in good faith for value. It was held that the maker of the check had not been guilty of any negligence that made him liable on the check, even though it had passed into the hands of an innocent purchaser for value. See also Greenfield Savings Bank v. Stowell, 123 Mass. 196, 1877, in which the learned opinion by Gray, C. J., cites many English and American decisions on this subject.

§ 48. An Instrument Once Negotiable Remains Negotiable. Suppose that a negotiable promissory note is made to *A* or order and is delivered to him and he indorses it payable to *B* without adding either "or order" or "or bearer". If *B* then indorses it payable to *C* or order and delivers it to him (of course before maturity) is it still

Jordan v. Reed, 71 At. 280 (N. Y.), 1908; Maddon v. Gaston, 121 N. Y. Supp. 951, 1910.

negotiable? Yes. This was so decided in Moore v. Manning, Comyns 311, 1718. Upon the delivery by the payee with the indorsement of his name, "the indorsee may write what he will and at a trial, when a bill is given in evidence, the party may fill up the blank as he pleases".[39]

[39] Edie and Laird v. The East India Co., 1 W. Black 295, 1761; Holmes v. Hooper, 1 Bay (S. C.) 160, 1791; Hodges v. Adams, 19 Vt. 74, 1864.

EXAMINATION PAPER

LAW OF BILLS, NOTES, AND CHECKS

PART I

Read Carefully: Place your name and full address at the head of the paper. Any cheap, light paper like the sample previously sent you may be used. Do not crowd your work, but arrange it neatly and legibly. *Do not copy the answers from the Instruction Paper; use your own words, so that we may be sure you understand the subject.*

1. What is a bill of exchange? Describe its essentials.
2. State the essential differences between the two kinds of bills of exchange.
3. What is the difference between a negotiable and a non-negotiable promissory note?
4. What is a check?
5. Explain a certificate of deposit.
6. Explain what is meant by the law merchant, and what relation it bears to the common law.
7. What fiction of law was adopted to make it possible to bring actions on bills of exchange under actions in assumpsit?
8. What was the origin of foreign bills of exchange?
9. What was the origin of inland bills of exchange and promissory notes?
10. Explain the necessity for and the meaning of the statute 3 and 4 Anne, ch. I, 1704.
11. What is an accommodation party?
12. Define *maker, drawer, payee, drawee,* and *acceptor.*
13. What are the essentials of a negotiable instrument?
14. What is "acceptance"? What is "acceptance for honor"?
15. What is the difference between the "indorser" and the "grantor" of a negotiable instrument?
16. What is "anomalous indorsement"?

17. What is the liability of an anomalous indorser? What is it under the N. I. L.?

18. What are the essentials of indorsement?

19. What is "indorsement without recourse"?

20. Describe the different kinds of indorsement.

21. What is meant by "the custom of merchants"?

22. Describe the conflict between the law merchant and the common law.

23. What is the effect of making a promissory note payable to the order of a fictitious person?

24. What exception is there to the rule that to be negotiable, an instrument must be payable to order or to bearer?

25. When may the title to a negotiable instrument pass without either indorsement or delivery?

26. What is "a purchaser for value without notice"?

27. What is "a holder in due course"?

28. What is the legal position of one who buys a negotiable instrument after maturity?

29. Describe the legal rights of one who has bought before maturity, a negotiable instrument having some legal defect or infirmity of which he did not know, although he had reason to suspect it.

30. What is the criterion by which courts determine whether he can recover in such a case?

31. Can an instrument that is negotiable be made non-negotiable? Give your reasons.

After completing the work, add and sign the following statement:
I hereby certify that the above work is entirely my own.
(Signed)